

***United States Court of Appeals
for the
District of Columbia Circuit***



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BRIEF FOR APPELLANTS AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

340

No. 20,342

JACKSON N. KRILL, and MAE MORGANS KRILL, *Appellants*

v.

DISTRICT OF COLUMBIA, and PEOPLES DRUG STORES, INC.,
Appellees

**Appeal from the United States District Court
For the District of Columbia**

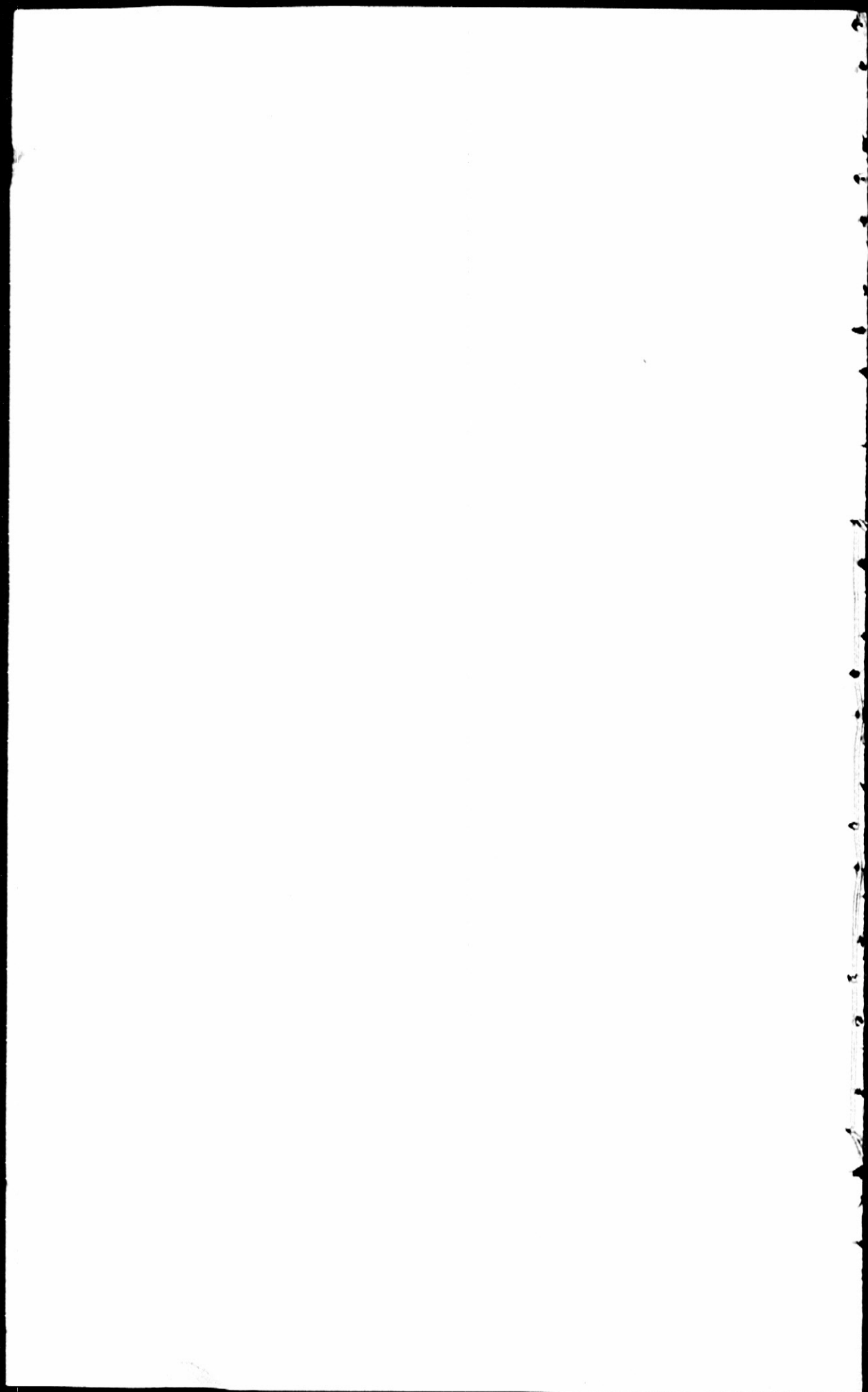
United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 13 1966

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Appeal from the United States District Court
For the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from the jury verdict directed for the Defendant Peoples Drug Stores, Inc., and rendered after trial for the District of Columbia. The trial Judge was the Honorable Burnita Shelton Matthews. Judgment for the Defendants was entered on April 6, 1966 and a Notice of Appeal was filed on April 25, 1966. This appeal is taken pursuant to 28 USC paragraph 1291.

STATEMENT OF FACTS

On the evening of December 24, 1962, the Appellants had delivered a Christmas gift to one of their friends in the Northwest quadrant of Washington, D. C., and were on the way to their home by automobile. Having determined to buy some minor personal items on their way back to their residence they proceeded to the Peoples Drug Store (one of the Appellees) at the corner of Wisconsin and Albemarle Streets, N. W. Their direction of travel was Westerly on Albemarle Street and Mr. Krill was the driver of the family car. Mr. Krill parked the car in the closest parking space available to the Drug Store; just East of Wisconsin Avenue on the North side of Albemarle Street, and proceeded on foot from the car up the North side of Albemarle Street, crossing Albemarle at Wisconsin Avenue. His way to the store was a treacherous way up an icy sidewalk, but once he had crossed to the Southeast corner of the intersection to the entrance of Appellant Peoples Drug Store, he found the entrance to the store cleared of snow and ice.

After completing his purchases, Mr. Krill departed the drug store by the same and only access and exit door. Remembering his trip up the North side of Albemarle Street, and the fact that the entry way to the store was cleared, Mr. Krill determined to return to his automobile by the sidewalk on the South side of Albemarle Street, adjacent to the drug store.

He testified that he turned right after leaving the store, and, since the time was approximately 5 P.M. and dark outside, the store lights only revealed the cleared condition of the immediate areaway of the store entrance. He took several steps (the exact number was never clear from the evidence in the case, as Mr. Krill made no precise mental note of this) in an ordinary stride and then, without warning his feet went out from under him and he found him-

self on the sidewalk, having fallen and fractured his left hip.

People who happened to be in the neighborhood at the time came to his assistance. They advised Mrs. Krill, who had remained in the parked car, of her husband's mishap, and, when she had brought the car to her husband's side, lifted him into the car. These people were not witnesses during the trial, their names and addresses being lost or misplaced, and no more exact location of Mr. Krill's fall was available other than his testimony that he fell after taking 5 to 10 steps to a point near a light or utility pole which was approximately 10 to 12 feet from a drain pipe coming from the roof down the side of the Peoples Drug Store building. Near the drain pipe area, where Mr. Krill had fallen, the ice was thicker and deeper. (T 64). The path that he had traversed adjacent to the Drug Store on the South side of Albemarle Street had not been cleared of ice and snow and there were ridges and hummocks of ice formed from the trampling of pedestrians in frozen and refrozen slush. (T 62). No other people were on the path or sidewalk Mr. Krill walked, at the time of his fall.

The testimony revealed that the Peoples Drug Store building was built all the way to the lot line; that there was a small grassy plot immediately next to the building, about 10 feet wide; that the sidewalk was 6 feet wide next to the grassy plot; that tree plantings occupied the area adjacent to the street in an area about 3 to 4 feet wide, and then came the curbing. Appellee, District of Columbia, admitted it owned the area from the building line to the street. (T 469 ff). The path on which Mr. Krill fell, while not exactly located in any evidence, was roughly where the sidewalk would be located, but since none of the entire area had been cleared of ice and snow, no exact locations were identified.

The testimony further showed that at this exact corner, there is a school crossing, where several hundred pedes-

trains cross at each traffic peak period. This Southeast to Southwest crossing from Peoples Drug Store to the library across the street is the most heavily used cross walk. (T 291) In this immediate area a Sears Roebuck Department Store and Hechinger Lumber and Furniture Store are located, along with a branch of the Public Library, Janney Elementary School, St. Anne's Parochial School, Immaculata Secondary School and Junior College, St. Anne's Church and other commercial enterprises on Wisconsin Avenue and Albemarle Street. (T 229-232) The pedestrian and traffic counts for Albemarle and Wisconsin Avenue for the year 1962 showed that daily vehicular traffic totalled 45,000 cars and 3700 pedestrians (approximately) as compared with 11th & G Streets, N. W., at the same approximate time of 30,000 cars and 29,000 pedestrians. The Court did not allow comparisons with other areas in Washington City. (T 302 ff).

The weather bureau records indicated that three days prior to the date of the accident December 21, 1962, there was 5.3 inches of snow and sleet with a maximum temperature of 32° and a minimum of 22°. Two days before the accident the maximum temperature was 38°, minimum 24°. One day earlier the maximum was 44°, minimum 25°. The day of the accident, maximum was 34°, minimum 33°. No precipitation occurred during the period after the first snow fall on December 21.

No evidence was introduced by the Appellees of any attempt at snow removal, by either Appellee, other than the areaway immediately in front of Peoples Drug Store. This work was done by Peoples, but they did none other.

As a result of his fall, Mr. Krill suffered severe and permanent damages. For the purposes of this appeal, the extent of these injuries, their cost and the resultant physical suffering will not be discussed. Plaintiffs' position is that the Court below erred in:

STATEMENT OF POINTS RELIED ON

1. Directing a verdict for Appellee Peoples Drug Store.
2. Failing to instruct the jury properly on the snow removal law of the District of Columbia, and the consequent duties on the Appellees.

ARGUMENT

I. It is a general principle of law that a landlord is required to maintain means of ingress and egress to his building in a reasonably safe condition for tenants and other invitees.

A. This general principle has been held to include a duty on the part of a landlord to keep the *approaches* to an apartment house (or a hotel or sig., a store) reasonably safe so that invitees would not be injured by the presence of an accumulation of snow or ice on the approaches.

Pressagno v. Euclid Investment Co., 72 U.S. App. D.C. 141 (1940).

B. Enforcing the general principles of law further, the *District of Columbia Code (Sec. 801, Title 7)* provides an affirmative duty on *every person in control of a building* fronting on a paved sidewalk to remove, within the first eight (8) hours of daylight after the ceasing to fall of snow or sleet, such snow or sleet from so much of the sidewalk as is in front of or abuts the building.

Failure to abide by the general principles of law or to comply with the direction of the Code is "evidence of negligence."

Hecht Co. v. McLaughlin, 93 U.S. App. D.C. 382; 214 F.2d 212 (1953).

Whetzel v. Jess Fisher Mgm. Co., 108 U.S. App. D.C. 385 F.2d 943 (1960).

II. The Appellants made a prima facie case of negligence when their undisputed evidence showed that the only area cleared of snow or sleet was the exact entry-way to the Appellee's (Peoples Drug Store) store.

A. The Appellants had proved:

1. The South sidewalk on Albemarle Street was one of the "approaches" to the store.

2. The sidewalk was covered with "ridges and hummocks" of ice formed from frozen and refrozen slush—indicating that no effort had been made to clear the walk initially; or to keep it clear.

3. The "sidewalk" in the language of the Code is both "in front of" and "abuts" the Appellee's (Peoples) building.

a. It would be a torturing of the plain meaning and intent of the law and the statute to hold either that the "sidewalk" on which Mr. Krill fell was not an "approach" to the Drug Store, or that the "sidewalk" did not "abut" the building because of the intervention of a few feet of city property, or that it was not in "front" of a store that has *one* entrance *at its peak* and extends laterally down two side streets. (sec, infra)

III. Having made a prima facie case, the Appellees were required to prove:

1. The Plaintiff Mr. Krill was guilty of contributory negligence.

2. The Appellees had made "reasonable" effort to comply with the general principles of law and/or the Code, and were therefore relieved from further responsibility.

3. The law does not contemplate liability in these circumstances on either Defendant.

A. Appellee (Peoples Drug Store) have successfully argued below that Mr. Krill fell on a public walkway that was separated from the Drug Store property by a grassy plot of several feet in width; and that therefore Peoples Drug Store cannot be held liable. Appellants concede that the Peoples Drug Store property extends only to the property line and that the total Peoples Drug Store property is covered by a building. Appellants further concede that Appellee, District of Columbia, owns that portion of the areaway on which Mr. Krill fell.

Nonetheless the law does not circumscribe the liability of a private landowner by holding that the limits of liability begin and end at the entryway to the store itself. If the liability of the landowner is to provide a safe means of "approach" to his premises, and his store is right on the public walkway, then his duty must extend to clearing the public walk, insofar as it may be necessary to afford a safe means of ingress and egress.

This problem was presented in a strikingly similar situation to the United States District Court for the District of Columbia in the case of *Robinson v. Park Central Apartments* (District Ct. D.C. No. 533-63, December 9, 1965). There the District Court held that

"... the rule requiring the owner of a multiple dwelling to provide a safe means of ingress and egress obviously is not limited to private property. It must include the portion of the sidewalk immediately adjoining or abutting the entrance to private property."

As Judge Holtzoff pointed out in furthering that principle by logical analysis:

"Ordinarily, a person cannot enter a building without first walking on the public sidewalk, and if there is a duty on the part of the building owner to provide a reasonably safe means of ingress and egress, it logically follows that this duty is as applicable to the portion of the public sidewalk that abuts on the property as

it is to that portion of the approach that is on the private property. To be sure, in the *Pessagno* case, the fall took place on a private driveway of an apartment house, but the principle of that case would be equally applicable to the portion of the public sidewalk immediately adjoining or located in front of the building, because without using it a person cannot enter the building."

In the case at bar Peoples Drug Store's only entrance is a diagonal at the exact point of the Albemarle—Wisconsin corner. There is no private property beyond the building itself. The *Store and the public* rely on the public sidewalk as the only means of approach. To hold that because the District of Columbia owns the total area of ingress and egress, Peoples Drug Store owes no duty for the safety of invitees is (as stated *supra*) torturing both the general principle of law and the snow removal statute as well.

B. Even assuming that Peoples owed no affirmative duty to invitees in general and Mr. Krill in particular *to clear snow and ice from the approaches* under the general principles of law or the Code, Peoples undertook to *deceive invitees into a feeling of safety* by cleaning a portion of the public walk.

Having undertaken to provide a safe approach by cleaning the public way at the exact entrance to the store were they obligated to do more?

It should be noted that the record showed this intersection to be traffic controlled by traffic lights; that the volume of car traffic was even heavier than mid-city Washington; that there were no parking areas closer than the one Plaintiff Krill used. There was literally no way to get to the Peoples Drug Store other than by using a public walk for some distance. Peoples knew this and in recognition began a snow removal program. Unfortunately, but unknown to Plaintiff Krill, this procedure

involved only a few entry-way feet. Relieved, after trudging up the North side of Albemarle Street to find this entry-way clear and clean, Mr. Krill determined to walk to his car on the South side (the side of Albemarle on which Peoples was located) and which he had every right to assume was part of the store approach which Peoples would have cleared as they did the entrance-way itself. Not until he was trapped on the ice did he know the deception. Then it was too late.

Having undertaken to provide a safe means of access to their store, Peoples owed, then, a duty to carry out their *assumed* role in a careful and prudent manner.

As pointed out in *Robinson v. Park Central Apartments, supra*, a landowner, having embarked on a venture for which it owed no affirmative duty, assumes the responsibility for carrying out the venture with reasonable care.

“Even if there was no legal duty to do so, once a person voluntarily undertakes to perform a task, he is held to the requirement that it should be done free of negligence, and if in this case there was negligence in taking care of the private areaway, there was equal negligence in taking care of the public sidewalk.”

(It should be observed as well, that Plaintiff Mr. Krill testified that he fell somewhere between a downspout carrying (presumably) therein water run off from the Peoples Drug Store building, and a utility pole, where the ice was “thicker and deeper” (T-64). This undisputed fact was significant, for it showed that Peoples Drug Store affirmatively contributed to the dangerous condition of the walkway. The building, by Peoples Drug Store testimony, existed in this condition for many years. The down spout could have had no other purpose than to discharge water (or melted snow or slush) across the public way. It was not decorative—and notice there was of its existence and purpose. While the thrust of People’s

testimony was to prove that the road grade ran slightly up to the point of Mr. Krill's fall—the percentage of grade was insignificant; with frozen ground the water would not be absorbed, so that the water had to spread over the ground. That Mr. Krill fell somewhere “near” this area was undisputed. Peoples’ engineer agreed that the water flow from the drain pipe would follow the topographic contour line which led to the precise point of the fall.)

It becomes apparent, if this line of reasoning is valid, that the Court erred in directing a verdict for Plaintiff Peoples Drug Store if the basis for directing that verdict was that no duty to Plaintiff Krill existed.

C. The Plaintiff, Mr. Krill, thus overcame the first hurdle in his case. He proved that there was a duty on the part of Appellee People’s (if not on the Plaintiff District of Columbia, *infra*) to make the walkway safe. There remained other hurdles, however:

1. Did Peoples, as a matter of law, discharge that duty, in a reasonable—non negligent—fashion.

The Weather Bureau records proved that the only snow fall of any significance occurred three (3) days prior to the day of the accident.

These records showed further that the temperature rose above, and fell below, freezing during the intervening days. During none of this period was anything done to remove the ice, snow or slush, by either of the Appellees.

The Court below held that the Snow Law of the District of Columbia (Title 7, Sec. 801 ff, D.C. Code) does not impose any *new* duty on the property owner, relying on *Smith v. District of Columbia*, 89 U.S. App. D.C. 7 (1951). There, our Court of Appeals said:

“The snow statute does not mention liability for injuries caused by a failure to perform the duty imposed

by it. And so the question here is whether the imposition of the duty to remove or to sand snow and ice changed to an absolute liability, a liability which has theretofore existed as a condition premised upon negligence. We held in *Radinsky v. Ellis* that the snow removal statute does not impose a liability on a property owner to respond in damages to a pedestrian who was injured by falling on the snow which the owner has not removed from the sidewalk. That decision rested on the premise that the primary obligation to keep the streets safe for walking rested upon the municipality and the conclusion of the Court was that the snow removal statute did not shift to the property owner any part of that duty. Implicit in that decision, however, is the holding that the statutory provision requiring a property owner to remove snow from the abutting sidewalk did not impose a liability different from or in addition to the liabilities theretofore existing for damages to persons injured. We think that same doctrine applies to the District Government. The snow removal law did not change or add to the basic liability of the District Government in respect to safe conditions on the public street.

* * *

"This Court in *Hecht Company v. Hohensee* pointed out that any duty which a property owner may have to remove snow and ice from the abutting sidewalk is fully served by the clearing of a reasonable portion of the sidewalk, where the fall of snow is such as to make it impracticable to clear the entire sidewalk."

Appellants contended in the Court below and reasserts here that no *new* duty was imposed and the Snow Law was not relied upon to prove "liability" as such. Appellants' position was simply that "failure to abide by the statute and to obey its directives was and is *evidence* of negligence."

Appellees Peoples Drug Store argued—and the Court below agreed—that since their property abutted solely on District of Columbia "park" property and not the public sidewalk as such, the snow law could not apply to them.

To so construe the statute as relieving a landowner of his intended responsibilities is to fail to abide by its intent which further includes the duty to remove . . . "such snow or sleet from so much of the sidewalk as is in front of . . . the building . . ."

The "front" of a building from an architectural point of view, says Webster, is

"any face of a building especially the face that contains the principal entrance"

Here the only entrance is a cater-corner on both street sides. Either side of the building—both on main streets—would be "the front."

Under the circumstances, and on the state of the evidence, there was a basis for an inference of negligence on the part of the Appellee Peoples Drug Store, and if the negligence existed, unquestionably it was the proximate cause of the accident.

This Court need not be concerned with the question of contributory negligence since this question was apparently not the basis for the direction of the verdict for Peoples Drug Store, and the case was submitted to the jury, as to the District of Columbia with instructions on this point.

IV. The Court's error, insofar as the District of Columbia's negligence is concerned and its jury instructions, rests on the more difficult thesis of "governmental duty."

A. Admittedly the sidewalk is District of Columbia property.

B. The directives of the snow removal law of the District of Columbia fell no more lightly on the Government than on a private landowner. The general principles of law, as well, would impose a duty on the District of Columbia so far as sidewalk snow removal is concerned.

As pointed out in *Altemus v. Talmage*, 61 App. D.C. 148 (1932) 48 F.2d 874, if the point of fall was on D.C. property in front of or abutting a building privately owned both the District of Columbia and the private property owner would be liable. (See also, *Robinson v. Park Central Apartments*, *supra*.)

C. Nor can the District of Columbia be held responsible for the clearance of all sidewalks throughout the entire City within eight (8) hours of any storm.

Where then does the Court intercede when major metropolitan streets and walks remain uncleared for upwards of 200 hours and impose the duty for municipal action?

The Highway Department admits to cleaning the streets and sidewalks in the downtown areas. The Court below would not permit the jury to pass upon the comparisons between the pedestrian and vehicular use of selected major streets on the generally sound theory expressed that the governmental agency cannot be charged with the duty of clearing all roads and sidewalks in the City after each storm.

Then why the Snow Removal Statute with its imposition of liability on the District of Columbia if the Statute is not to be enforced and civil juries are not instructed that this Statute applies to the District of Columbia and that failure to comply with the Statute is "Evidence" of negligence.

The real and pernicious error of the Court below lay not alone in failing to advise the jury of the existence of the Snow Removal Law as it applies to the District of Columbia, but more that the Court lay emphasis on all of the exculpatory circumstances relating to governmental duty without mentioning the positive injunctions.

When the District of Columbia Courts insulate the District of Columbia Government from liability by interpreting the District of Columbia Statute to mean other than

what the plain language states and refuses to instruct on it, we find ourselves in the position of the child in wonderment in "The Emperor's New Clothes" who says in all innocence, "But, Mother, the Emperor has no clothes."

Indeed, if there is really so elusive a meaning to the Snow Removal Statute as we find in *Urow v. District of Columbia*, 114 U.S. App. D.C. 351; F.2d (1963), and the base in bar, there should be no such law. And it benefits the Courts not a whit to say; "If Congress meant *literal* compliance, they would provide the budgetary means." Really, the converse is true. If Congress were to see that strict compliance with its literal statutes is being required by the Courts, they would be faced with the alternative of funding enforcement with budgetary means or wiping the law from the books.

CONCLUSION

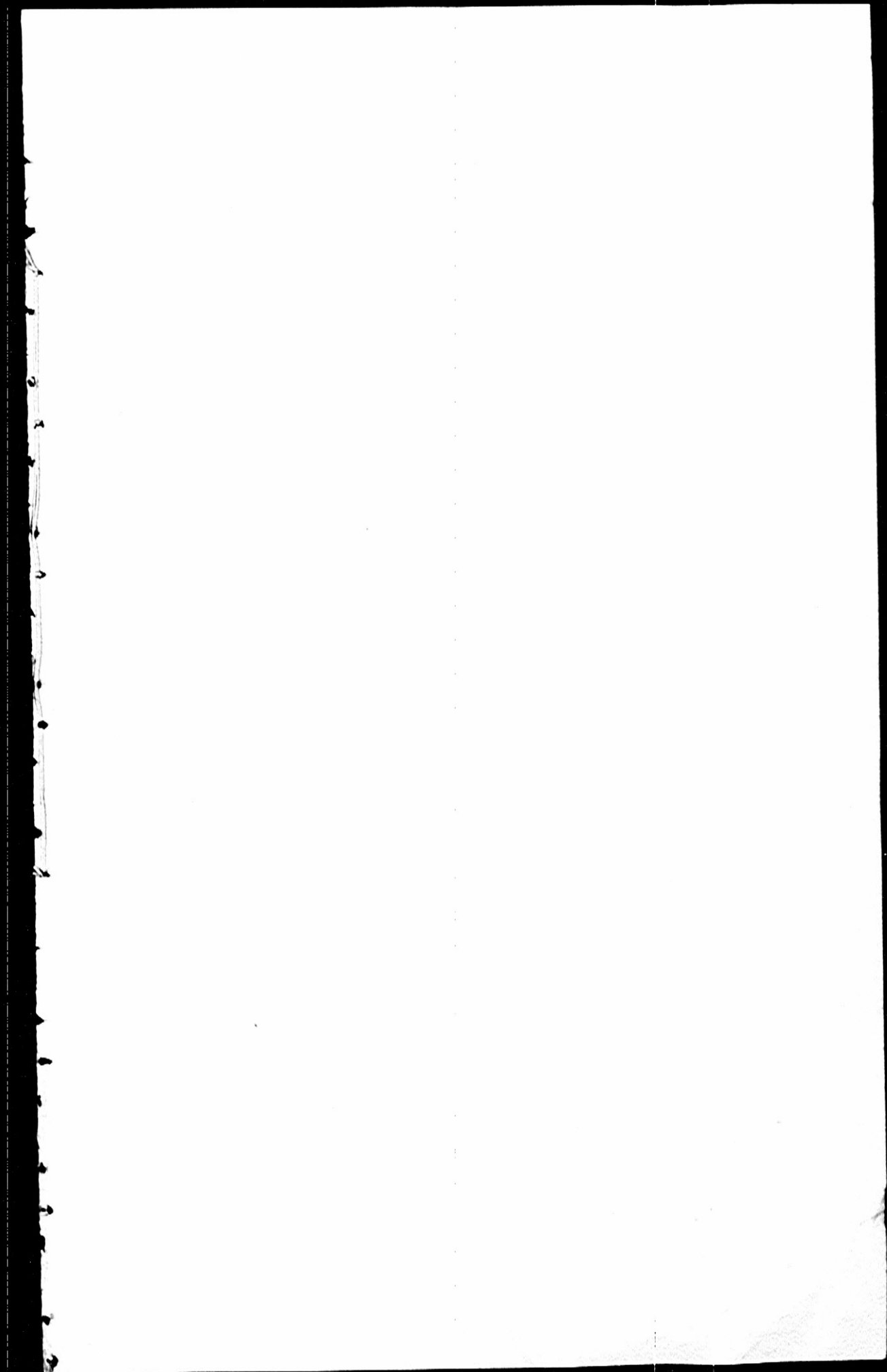
For all of the above reasons Appellants urge a reversal of the Court below and a remand of this case for a new trial.

Respectfully submitted,

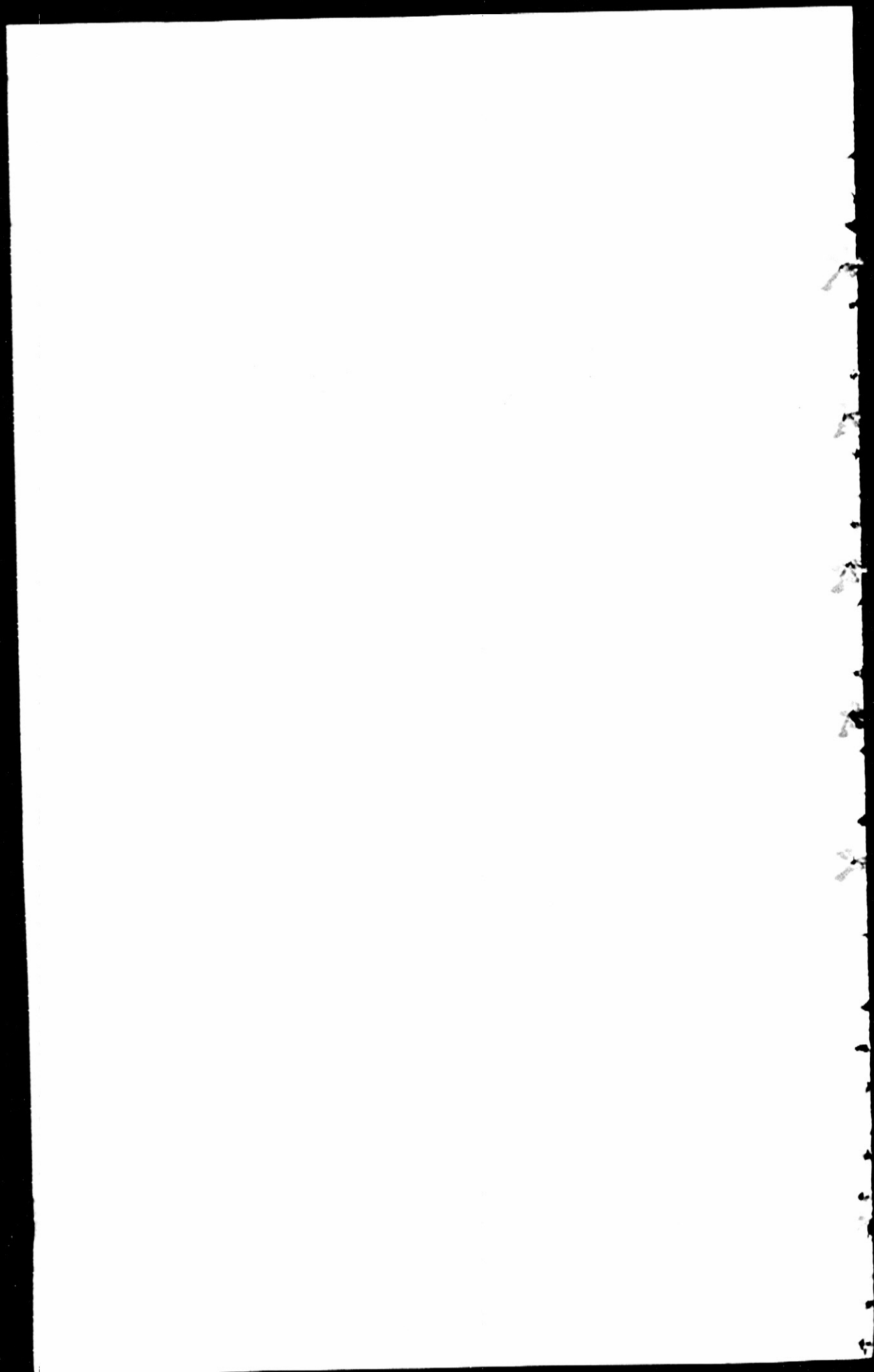
STANLEY B. FROSH

RENAH F. CAMALIER

Attorneys for the Appellants



Joint
APPENDIX



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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1768-63

JACKSON N. KRILL and MAE MORGANS KRILL
5007 Randall Lane, (Sumner) Washington 16, D. C.
Plaintiffs

v.

DISTRICT OF COLUMBIA
Washington 25, D. C.

and

PEOPLES DRUG STORES, INC.
c/o CT CORPORATION SYSTEMS
918 - 16th Street, N.W., Washington, D. C.
Defendants

Complaint for Damages for Personal Injuries

Come now the plaintiffs and for their cause of action, respectfully state as follows:

1. That the plaintiffs, Jackson N. Krill and his wife, Mae Morgans Krill, are adult citizens of the United States and residents of the State of Maryland. The defendant, District of Columbia, is a Municipal Corporation subject to this suit under the provisions of the District of Columbia Code (1951), Title 1, Section 208. The amount in controversy is in excess of Ten Thousand Dollars and is within the jurisdiction of this Court.

2. That the Commissioners of the District of Columbia were duly notified on March 1, 1963, and on June 24, 1963, of the happening of the within accident, which notification was acknowledged on March 5, 1963. Said notice was given

pursuant to and in accordance with Title 12, Section 208, of the District of Columbia Code (1951 edition). That the defendant, Peoples Drug Stores, Inc., is a corporation doing business in the District of Columbia and elsewhere.

3. That at all times material to this cause, the defendant, District of Columbia, was in possession and control of a public highway in the District of Columbia known as Albemarle Street, Northwest, and a public highway in the District of Columbia known as Wisconsin Avenue, Northwest, together with the sidewalks adjoining said public highways, particularly that portion of the sidewalk on the South side of Albemarle Street, Northwest, at or near its intersection with Wisconsin Avenue, Northwest, between the south curb line of said Street, and the south building line on the south side of said Albemarle Street, Northwest. That the defendant, Peoples Drug Stores, Inc., on behalf of itself and the public who are invited to engage in business with said defendant, enjoy the use and control of said sidewalk aforesaid, and have the obligation to maintain said highway free and clear of obstructions including ice and snow thereon.

4. That on or about the 24th day of December, 1962, while walking on the said sidewalk, in the particular portion aforementioned, the plaintiff Jackson N. Krill, was caused to fall by reason of ice and snow which had accumulated and had been allowed to accumulate by the defendants and each of them. That the accumulation of said ice and snow, present on said sidewalk at the point of said fall, represented a dangerous and defective condition of said sidewalk rendering it unsafe for pedestrian traffic.

5. That the said dangerous and defective condition of the said sidewalk, and the said fall caused thereby, and the injuries, losses and damages hereinafter complained of, were caused by the negligence of the defendants and each of them, their servants, agents or employees, who knew or should have known of the said dangerous and defective

conditions, and who in the exercise of reasonable care could have prevented or corrected said conditions.

6. That as a result of the defendants' negligence as aforesaid, the plaintiff, Jackson N. Krill, suffered a fracture of the left femur, other bruises and abrasions in and about his body, shock to his nervous system and other pain or suffering; that he suffered in the past and will suffer grievous pain of body and mind; that he suffered a permanent partial disability and permanent disfigurement to his left femur; that he has incurred and will in the future incur substantial hospital and medical expenses.

7. That as a further result of the defendants' negligence as aforesaid, the plaintiff, Mae Morgans Krill, was caused to lose and in the future will lose the services, companionship and consortium of her husband, the said plaintiff, Jackson N. Krill.

WHEREFORE, the plaintiffs demand judgment as follows:

1. For the plaintiff, Jackson N. Krill, the sum of Seventy-five Thousand Dollars (\$75,000) besides the cost of this action.

2. For the plaintiff, Mae Morgans Krill, the sum of Fifteen Thousand Dollars (\$15,000) besides the cost of this action.

STANLEY B. FROSH

RENAH F. CAMALIER
1430 K Street, N.W.
Washington 5, D. C.

Of Counsel:

Attorneys for the plaintiffs

CAMALIER, FROSH, SPERLING & DORSEY
1430 K Street, N.W.
Washington, D. C.

JURY DEMAND

The plaintiffs demand trial by jury on all counts.

STANLEY B. FROSH

RENAH F. CAMALIER

Answer of Defendant District of Columbia*First Defense*

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

1. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph numbered 1 of the complaint. This defendant admits that it is a municipal corporation and says that the remaining allegations contained in paragraph numbered 1 of the complaint are conclusions of the pleader and require no answer.

2. In answer to the allegations pertaining to this defendant in paragraph numbered 2 of the complaint, the District of Columbia admits to the receipt of two letters; one dated March 1, 1963, over the signature of Jackson N. Krill purporting to describe Mr. Krill's sidewalk fall on Albemarle Street, N.W., in the District of Columbia on December 24, 1962, and a letter dated June 24, 1963, over the signature of Renah F. Camalier, Esq., attorney for Jackson N. Krill, purporting to describe the same occurrence. However, this

defendant makes no representations concerning the legal significance of these documents. The remaining allegations pertaining to this defendant, contained in said paragraph, are denied.

3. In answer to the contentions of paragraph numbered 3 pertaining to this defendant, the District of Columbia admits the existence of public thoroughfares known as Albermarle Street and Wisconsin Avenue and further admits that they are located in the Northwest section of the District of Columbia and says its duty with regard thereto, is to use reasonable care to keep such ways in a reasonably safe condition for the purpose for which they are primarily intended. This defendant denies the remaining allegations pertaining to it, contained in said paragraph.

4, 5, 6 and 7. This defendant denies all allegations pertaining to it contained in paragraphs numbered 4, 5, 6 and 7 of the complaint.

Further answering the complaint, this defendant denies all allegations not specifically admitted or otherwise answered.

Third Defense

This defendant says that if plaintiffs suffered injury and damage as alleged such injury and damage were the result of the male plaintiff's sole or contributory negligence or of the joint or concurring negligence of the male plaintiff and defendant Peoples Drug Stores, Inc., or the assumption of the risk by the male plaintiff.

Fourth Defense

This defendant says that the claim of the female plaintiff is barred for failure to comply with Section 12-208, D.C. Code, 1961 ed.

/s/ CHESTER H. GRAY
Chester H. Gray
Corporation Counsel, D. C.

/s/ JOHN A. EARNEST
John A. Earnest
*Assistant Corporation Counsel,
D. C.*

/s/ JAMES M. CASHMAN
James M. Cashman
*Assistant Corporation Counsel,
D. C.*

Attorneys for Defendant

• • • • •
Answer by Defendant Peoples Drug Stores, Inc.

Comes now defendant Peoples Drug Stores, Inc. by and through their attorneys, Gallagher and Thompson, and answers the Complaint filed in the instant matter as follows:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the Complaint, this defendant avers:

1. This defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the first sentence of this paragraph and they are, therefore, denied. It is not necessary to respond to the jurisdictional allegations contained in the remaining two sentences of this paragraph.

2. The second sentence is admitted. It is not necessary to respond to the first sentence.

3. The first sentence is admitted. The second sentence is denied.

4. The allegations contained in this paragraph are denied.

5. The allegations contained in this paragraph are denied.

6. The allegations contained in this paragraph are denied.

7. The allegations contained in this paragraph are denied.

Third Defense

If the male plaintiff was injured as alleged, it was the result of his sole or contributory negligence thereby precluded recovery by both plaintiffs.

Fourth Defense

If the male plaintiff was injured as alleged, it was the result of a risk that he assumed, thereby precluding recovery by both plaintiffs.

Fifth Defense

If the male plaintiff was injured as alleged, it was the result of the negligence of parties other than this defendant, thereby precluding both plaintiffs from recovering against this defendant.

WHEREFORE, defendant Peoples Drug Stores, Inc., having fully answered the allegations contained in the instant Complaint, respectfully submits that it be dismissed with costs against plaintiffs.

GALLAGHER AND THOMPSON

By: J. ROY THOMPSON, JR.
J. Roy Thompson, Jr.

JOHN JUDE O'DONNELL
John Jude O'Donnell
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Washington 5, D. C.
NA 8-2244

*Attorneys for Defendant
Peoples Drug Stores, Inc.*

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

48

Jackson N. Krill

a plaintiff, called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Frosh:

Q. Would you state your full name, please? A. Jackson N. Krill.

Q. Where do you live? A. At 5007 Randall Lane, Washington, D. C., is the correct address.

Q. It is actually— A. It is actually just in Maryland.

Q. It is over the District line? A. Over the District line.

Q. Mr. Krill, how old are you? A. Fifty-four.

Q. And are you married? A. Yes, sir.

Q. What is your wife's name? A. Mae Morgans Krill.

Q. And is she seated here with us at counsel table?
A. Yes, she is.

49 Q. How long have you been married? A. Thirty-two years.

Q. And do you have any children? A. Yes, we have had three children, two of whom are living.

Q. What are their ages? A. One is eighteen years old, a daughter, the second daughter is twenty-six years old.

Q. Where are you employed? A. I am employed with the United States Secret Service.

Q. How long have you been employed with the Secret Service? A. Twenty-nine years, it will soon be thirty years.

Q. What is your position at the Secret Service? A. My position at this time is assistant to the Director.

Q. And can you tell us anything about what your duties generally might be? A. My duties at the present time, I am assistant to the Director for inspections and audit.

Inspections in Secret Service consist of comprehensive inspections of the sixty-seven field offices. The duties also encompass the protection of the President in Washington as well as in the various locations throughout the country, the President's family, the Vice President, the
 50 former Presidents, the successors to the Presidency, this is a protective function, it is widespread throughout the country. I participate in these less actively than previously, but still actively, in addition to handling administrative and management problems connected with all of these duties.

One other point that I might mention is that the Secret Service also has many criminal statutes which it enforces, including those of counterfeiting and forgery and various other activities of that type.

Q. Mr. Krill, in December of 1962, were you also employed by the Secret Service in relatively the same position? A. Yes.

Q. Do you recall the 24th of December, 1962? A. Yes, I do, very vividly.

Q. Would you tell us whether you can recall where you had been in the late afternoon of that day? A. Yes. Mrs. Krill and I had driven to the home of a widowed friend of ours, a Mrs. Sally Hall who lives on Chesapeake Street. We had delivered to her, as we did every Christmas since the death of her husband, a gift for the Christmas season and we were returning from that call, driving up Albemarle Street, when we stopped to go into the Peoples
 Drug Store.

51 Q. What was the purpose of your going into Peoples Drug Store? A. I went to purchase primarily some razor blades and stamps.

Q. Would you tell us what hour of the day it was that you came to the Peoples Drug Store at Albemarle and Wisconsin? A. It was about 5 p.m.

Q. Had you been at this store at any time prior to this particular date? A. Yes, but not in the recent past.

In explanation, I would say that in previous years we had lived in that neighborhood and had been at the store in the past, but not in the recent past at this time.

Q. So that you were at that time familiar with the intersection of Albermarle Street and Wisconsin Avenue, N. W.?

A. Yes, sir.

Q. Now, Mr. Krill, can you tell us where you and Mrs. Krill parked the automobile preparatory to going to Peoples Drug Store? A. Yes. As we drove west on Albemarle, the closest parking spot was on the north side of Albemarle, the last space before the intersecting street.

Now, there is a double street at that point, one side runs past the Woodrow Wilson High School, the
52 other side runs parallel to Sears Roebuck parking lot. It was the east one of those streets which runs past the high school, the last parking space on Albemarle before you come to that street.

Q. Who was driving the vehicle that day? A. I was driving the vehicle up to that point.

Q. Where was Mrs. Krill? A. She was in the front seat on the other side.

Q. Was there any parking space available to you going in that direction, in a westerly direction on Albemarle, was there any parking space near Peoples Drug Store than the one that you took? A. No, sir, there was not. In fact, to my knowledge, there has never been any parking allowed at that point.

Q. Mr. Krill, do you recall what the weather conditions were on or about Christmas Eve Day of 1962? A. Yes, it was cloudy, gloomy and cold.

Q. Had there been any snow falling in the District of Columbia, as you recall, on the days prior to the 24th of December, 1962? A. Yes, my best recollection is that it had snowed several times in the preceding days. I know it had snowed within three or four days prior to that.

Q. Do you know whether it had snowed on the
53 24th? A. I don't recall that it snowed on the 24th.

Q. Do you recall whether it had snowed on the
23d? A. I am not clear on that, I don't believe it did.

Q. Was there any ice on the street as you drove up
Albemarle toward Wisconsin Avenue? A. Yes, there were
patches of ice on the street in protected places.

Q. When you came to the place where you parked your
vehicle, Mr. Krill, would you tell us just what you did?
A. I got out of the car on the driver's side, walked around
the car, got on the sidewalk and went up the north side-
walk, the sidewalk on the north side of Albemarle Street.

Q. Would you describe the condition of the sidewalk
on the north side of Albemarle Street as you walked
toward Wisconsin Avenue? A. It was not good. There
were patches of ice, rough ice, in spots, all the way up
right to the intersection of Wisconsin. The street, it was
not easy to walk on.

Q. Was that the same side of the street as Peoples Drug
Store? A. No, sir, that is the opposite side of the street.

Q. What did you do, if anything, when you came to the
intersection of Albemarle and Wisconsin Avenue?

54 A. I turned left, crossed Albermarle Street to the
south side of the street.

Q. Would you describe the condition of the sidewalk when
you reached the south side of Albemarle and Wisconsin?
A. At that point, when I reached that sidewalk, it was
clear at that point.

Q. What, if anything, did you do then? A. I walked
through the cleared space into the front door of Peoples
Drug Store to make the purchases.

Q. Did there come a time when you had concluded making
your purchases then and determined to leave Peoples Drug
Store? A. Yes, sir. I was not there very long.

Q. About how long were you there? A. Oh, perhaps
ten or twelve minutes.

Q. What did you do when you left Peoples Drug Store?

A. I went back to the same entrance, walked outside and turned to the right to go down the south sidewalk.

Q. When you got outside of Peoples Drug Store, would you tell us what, if anything, you observed with reference to the sidewalk immediately in front of the entrance to Peoples Drug Store? A. That part of the sidewalk was

55 cleared and was lighted by a light shining through the glass doors, it was cleared in front of the doorway.

Q. How far could you see to your right or your left at that point? A. Well, you could see, visibility was not too bad but it was becoming dusk. It wasn't dark but it was becoming that part of the day. You could see in the immediate foreground, either way, and as far as I could see, within that area of light the sidewalk was cleared.

Q. So, what did you do? A. So I turned to the right and walking a normal stride, walked down the sidewalk parallel to Peoples Drug Store.

Q. What side of the street was it this time? A. That is on the south side of the street.

Q. And that would be on the other side of the street from that which you took coming to Peoples Drug Store? A. Yes, sir.

Q. Would that be the same side of the street as Peoples Drug Store? A. That is right.

Q. And would you tell the Court and the jury how far you had proceeded—strike that.

Would you tell the Court and the jury what happened to you after you started walking down Albemarle
56 Street? A. I had gone a short distance when I discovered that the street was covered with chopped ice, ice that had or snow and ice that had been walked on and had frozen into hummocks and peaks and pits and almost before I had time to think about it, my feet had gone out from under me and I fell.

Q. Now, Mr. Krill, you have heard the opening statements of counsel both for the plaintiff and for the defendant with reference to the question of where you fell. Can you tell the Court and the jury with any exactness where you fell on this sidewalk? A. Well, the question of exactness is hard to arrive at because I had no reason to count the steps or to judge the distance. But I was walking at a normal pace, believing that the sidewalk was clear as it was in front of the door. I think I walked from five to ten steps, I can't be much more definite than this, and then I fell at that point.

Q. What were you wearing on that day? A. I was wearing the ordinary low-cut shoe.

Q. And from the standpoint of your other clothing, was there anything significant? A. Oh, yes, I was wearing a topcoat, tweed overcoat actually, and a tweed suit. I was wearing a hat because it was cold.

57 Q. But you didn't have any overshoes on, did you? A. No, I did not.

Q. Now, Mr. Krill, would you be able to describe for the Court and jury how you fell? A. This happened so quickly I don't know exactly. My feet went out from under me, I can only assume that I stepped into a slippery trough and I fell backward heavily.

Q. How did you fall, on what part of your body did you fall? A. Somewhat on the left side of the body, but I fell not quite straight backward but I fell backward and a little bit to the left.

Q. Then what happened? A. I was stunned for a moment and hardly realized what had happened. I started to get up or tried to get up and found that I was not able to do that.

Q. What do you mean? A. I wasn't able to get up. At that point, I thought maybe I was just stunned. A lady came across the street and asked me if I was injured, could she help me. And I said yes, I believe I am injured, or words to that effect, and would you go, you could help me

by going down the street to where a waiting car is parked and tell my wife to come down.

58 Mr. O'Donnell: May we object to this line of questioning involving hearsay answers.

Mr. Frosh: He is just saying what he told this person.

By Mr. Frosh:

Q. You may not tell us anything that is hearsay and I think you understand what is hearsay. A. Yes.

Q. Would you go ahead? A. I asked her to go down the street to the green car to tell my wife I had fallen on the ice and would she come up to that point.

Q. Did there come a time when your wife did come to where you were? A. Yes, within a few minutes she came there.

Q. Did there come a time when anybody else came to the point where you were on the sidewalk? A. Yes, as the lady went down the street to advise my wife I had fallen, two young men also came across the street from the north side and asked if they could help me.

Q. What, if anything, did you say to them? A. I said yes, I think you can. I have fallen and I don't seem to be able to get up.

Q. Did there come a time when they offered any
59 physical assistance? A. They said do you want us to lift you up and I said yes, help me on my feet. They were standing at that point, they did lift me on my feet.

Q. Were you able to stand on your feet? A. Not on the left leg, no.

Q. Would you describe the condition of that left leg? A. The left leg was dangling and was useless, I couldn't bear any weight on it, I couldn't stand on it.

Q. Where was your wife at this time? A. She had just about that time driven up in the car. She said we would get an ambulance and they said it would be quicker—

Mr. Cashman: Objection, Your Honor.

The Court: Just tell us what you did or what they did.

The Witness: They suggested if I was put into my own car and driven by my wife to the hospital, I would get treatment much more quickly than if I stayed there on the ice, and they did carry me to the car and place me in the car.

By Mr. Frosh:

Q. Now, Mr. Krill, would you tell the Court and jury what, if any, sensation or feeling you had with
60 reference to pain after you fell? A. Momentarily I
I was in more or less a state of shock but when I tried to stand, when the leg dangled and particularly when I was getting into the car, the pain was terrific, the pain was agonizing, in fact I couldn't permit them to handle me, I had to be lifted into the car and then I partially pulled myself into the car with my own weight because I was in great pain.

Q. Did Mrs. Krill drive at that point? A. Yes, sir, she did.

Q. Would you tell us where she drove you? She drove to the Washington Clinic.

Q. Where is that? A. That is at Wisconsin and Western Avenues.

Q. What happened then, if you recall? A. She drove to that point because we are familiar with the clinic and we knew a doctor.

Q. What was his name? A. Dr. Davis. When we got to the clinic, he came to the car and when he found that it was a fall and that my leg was useless, he said I am afraid we can't handle that here.

Mr. Cashman: Your Honor—

The Court: Just a minute, you are not to tell us
61 what people said but you may tell as to what you did and what they did.

The Witness: Yes, Your Honor. I am sorry I get into the history of what other people said. He came to the car and suggested that we go immediately—

By Mr. Frosh:

Q. Don't tell us what he suggested, just tell us what you did.

The Court: As a result of talking to him, what did you do?

The Witness: My wife drove to Sibley Hospital.

By Mr. Frosh:

Q. Now, Mr. Krill, I want to go back for a moment with you to the scene of the accident. You have told us that you had taken a certain number of steps down the south side of Albemarle Street when there came a time that you fell. Now, can you describe for us that side of the street with reference to whether there were any pathways or sidewalks on which pedestrians could walk? A. It was not really possible to tell in the area outside of the light, except there was a pathway that had been trodden out by pedestrians in the previous snow. This pathway was,

as nearly as could be judged, where the sidewalk
62 would be, this is the normal traffic way for that area.

Q. So you were walking on what was the sidewalk except that it was covered, is that correct? A. That is correct.

Q. Now, could you tell us whether you had occasion to observe whether that sidewalk appeared to have been cleaned from any snow after the 21st of December snowfall? A. Yes, sir. I am quite clear it had not been cleaned because it was covered with footsteps, steps that had been made in slush and refrozen, almost the entire area from the curb line in had been trodden out but the center part was more trodden than the other and that was the only path that there was through there, there had been no cleaning, there was no piled snow.

Q. Did there come a time when you had occasion to observe a drain pipe on the Peoples Drug Store building? A. Yes, sir. I observed this as I sat on the ice waiting for my wife to come up.

Q. Would you tell the Court and the jury whether you had occasion to observe how far, approximately, that drain pipe was from where you were sitting on the sidewalk or lying on the sidewalk? A. I had no occasion at that point to make any measurement of distance but I would say it was—

Mr. O'Donnell: Objection, Your Honor, this is speculation.

Mr. Frosh: Well, he may tell us approximately how far away from him it was.

The Court: Do you think you could tell us approximately how far away you were from the drain pipe?

The Witness: Yes, Your Honor, I believe that I was ten or twelve feet from the drain pipe.

By Mr. Frosh:

Q. And did there come a time when you had occasion to notice any utility poles or light poles on that street? A. Yes, sir, there was a light or utility pole about opposite where I had fallen, maybe slightly to the Wisconsin side of where I had fallen.

Q. And did you have occasion to observe any other items that gave you an idea of where you were with reference to the Peoples Drug Store building? A. No specific one except that I was parallel to the building a distance below where it was cleared and somewhere opposite this pole. I had no reason to make any measurement of the distance or to keep it in mind and I can't be very explicit in that connection.

64 Q. Now, Mr. Krill, was there anything unusual about the ice at or near the point of the drain pipe?

A. Yes, there was.

Q. Would you tell us what that was, as you saw it? A. the ice at that point was thicker and a more solid type of ice, more like the type of ice that would form where water has seeped under the snow.

Mr. O'Donnell: Objection, Your Honor.

Mr. Cashman: Objection.

The Court: The objection is sustained.

By Mr. Frosh:

Q. Well, you may describe it, but don't—

Mr. Frosh: I am afraid I need the Court's help in how to—

The Court: Don't draw a conclusion as to what made it that way.

The Witness: Then I would say the ice was thicker and deeper at that point.

By Mr. Frosh:

Q. Now, Mr. Krill, how long were you there on the sidewalk before Mrs. Krill and these two gentlemen got you into the car and you went on your way to the hospital?

A. I would say ten minutes.

65 Q. And during the time that you were there, did you see anybody from Peoples Drug Store? A. No, sir.

Q. Did anyone from the drug store come outside, to your knowledge? A. No, they did not.

Q. Would you tell us whether there was much vehicular traffic on Albemarle Street at that time? A. No, sir, at that point traffic was light.

Q. And how about pedestrians? A. The pedestrian traffic was also light, it was nearing Christmas Eve and things were becoming much quieter, there were few people around.

Q. Were there any people on the street when you came to the drug store? A. No, sir.

Q. You are familiar with this street corner, are you not, from having been there before? A. Yes, I am.

Q. How many other stores are there on the same side of Albemarle Street as Peoples Drug Store, how many were there in 1962? A. I believe there were three.

66 Q. And were there any stores across the street on the north side of Albemarle Street? A. Yes, sir,

there is a liquor store on the corner and there is a hobby shop behind that, and I believe there is a little parking lot adjoining the hobby shop, as I recall.

Q. Are there other stores up and down Wisconsin Avenue, both north and south of Peoples Drug Store on that east side of the street? A. Yes, there are many stores.

Q. And on the west side of Wisconsin Avenue, is there likewise a store? A. Yes, Sears Roebuck Store is on the northwest corner and Tenley Library is on the southwest corner.

Q. And Peoples Drug Store and Sears Roebuck are about cater-corner? A. They are.

Q. And the library and the liquor store are about cater-corner? A. That is correct.

Q. Now, Mr. Krill, let's go on with what happened at Sibley Hospital when you arrived there. Would you tell the Court and the jury whether there came a time when you met any physician or doctor at Sibley Hospital?

67 A. Yes. As we drove into Sibley Hospital grounds, we saw Dr. Baker.

Q. Who is he? A. Dr. Wyrth Baker is a personal friend of the family and we had had him partially in treatment but he wasn't necessarily the family doctor at that point.

Q. What, if anything, did Dr. Baker do at that point? A. My wife stopped the car and told him what had occurred and he said he would—

Q. Don't tell us what he said, just tell us what he did. A. And then he assisted in getting a room and getting me to the receiving entrance.

Q. Did there come a time when any other physician attended you at Sibley Hospital? A. Yes, Dr. Julius Radice.

Q. Was there any other doctor with Dr. Radice? A. No one except Dr. Baker, they were together and possibly an admitting physician, I don't know.

Q. Can you tell us what, if anything, happened to you, what was done to you at the hospital, if you know? A. I was taken to the X-ray Room and X-rays were taken of that portion of my body.

Cross-Examination

(Resumed)

By Mr. Cashman:

Q. As I understand it, Mr. Krill, you were with the Secret Service twenty-nine years, is that right? A. Yes, sir.

Q. Mr. Krill, would you kindly tell me how many of those years were in the performance of an agent's duties? A. Well, about all of them except, as I stated previously, until around 1955. I then became an inspector and this does not relieve you from the agent's duties, it merely adds other duties, supervisory in a sense, over the agents in service.

Q. I see. That was in 1955? A. Yes.

114 Q. You said it called for a lot of traveling, did it?

A. It called for a great deal of traveling and special types of investigations and I might add, as I presume you already know, that Secret Service agents are on call 24 hours a day for any type of duty that it is necessary to perform.

Q. Yes. Mr. Krill, what is your present position at the Secret Service, would you describe your type to the Court and ladies and gentlemen of the jury? A. I am assistant to the Director of the Secret Service for inspections.

Q. I see. Now, how long have you been in that capacity? A. Since November 1965.

Q. I see. Now, prior to November of 1965, what was the title of your employment within the Secret Service? A. The title at that time was chief inspector for the Secret Service, the duties are the same but this was a reorganization and a title change.

Q. I see. Was there any change in salary or anything like that? A. Not as a result of a change in title, no.

Q. Would you consider it a promotion of any kind in November of 1965, now that you are assistant to the Direc-

115 tor? A. No, that would not be considered a promotion because the duties are the same thing, it was merely a redesignation of the position.

Q. I see. In no way it would be considered a lesser job, however? A. No, it would not.

Q. It was the same job that you held before? A. It was the same job, that is right.

Q. Now, I asked you previously, just before Dr. Baker testified, Mr. Krill, if there was any special training that a Secret Service man undergoes? A. Yes, there are many types of special training. All agents in the Secret Service first attend a Treasury training school on basic Treasury enforcement problems. Secret Service agents, in addition, attend Secret Service training schools, these last five to six weeks. We then have six or seven other types of schools, there are schools on protective techniques, on the identification of handwriting, there are management and organization institutes, there are supervisors' training activities; these are not all in rotation, they come at various times and periods.

Q. They would be appropriate to whatever particular career within the Service that you might be pursuing, 116 would that be a fair statement? A. That is right.

Q. Mr. Krill, when a man comes into the Secret Service, you say there is a general Treasury school that is attended by every Secret Service man? A. Yes, sir.

Q. And how long does that training last? A. Six weeks, I believe.

Q. Six weeks. And then you say that if you are a member of the Secret Service, you then go on to a special school which is given only to Secret Service employees, is that right? A. That is correct.

Q. And how long is the tenure of that course? A. Five weeks.

Q. Five weeks. Now, did you attend both such training periods? A. Yes, sir.

Q. In addition to those two that you have just described, what other training have you had, Mr. Krill, within the Secret Service? A. Well, that is a rather extensive list. I am an instructor in the Secret Service schools, I have attended the administration and management institute, the instructors' institutes, there are courses 117 also that are given by Brookings Institution, the Civil Service Commission, and various other types of institutions of that kind. I probably cannot give them all to you from memory because there have been many of these.

Q. I see. They have been considerable, though, throughout your career? A. Yes, sr.

Q. What do you instruct, by the way, Mr. Krill, what do you instruct in? A. Well, I have had a number of different things in the school. My most recent one was in the inspection techniques for the Secret Service and the impact they would have on the individual agent. I designed and for a number of years gave a course related to report writing, the technique of writing reports. For several years I handled the instruction related to the detection of counterfeit money, the analysis of forged checks, and in more recent years there have been additional ones such as various programs, mobilization planning for relocation, the activities incident to protection of the President and other principals that are being protected.

There have been a number of these throughout the years.

I don't think of any others by name right at the 118 moment, but I am not sure that I have covered all of them because this has been of long standing and has varied from time to time.

Q. I am aware of that, Mr. Krill, thank you.

Mr. Krill, referring to the date and the accident with which the Court and the jury is concerned, will you tell us what time it was, approximately, when you had the fall

that you described earlier? A. About 5 o'clock in the afternoon.

Q. It was about 5. Now, you said that you had just come from delivering a Christmas present to a friend of yours?

A. Yes.

Q. And where did that person live? A. She lives on Chesapeake Street, east of Connecticut Avenue, I don't know the exact house address.

Q. And what was your route of travel once you left her house? A. We drove up Chesapeake Street and turned left on some intersecting street to Albemarle and then went straight up Albemarle Street to where we parked.

Q. Toward Wisconsin Avenue? A. Toward Wisconsin Avenue.

Q. And what was it your intention to do if you had
119 not stopped where you did, what would you do from there, how would you get home? A. We would have gone straight on down Albemarle Street until it intersected with Massachusetts Avenue.

Q. I see. Where would you go on Massachusetts Avenue? A. We would have turned right and gone out Massachusetts Avenue to home, out in that direction.

Q. How far over the District line is your home, Mr. Krill? A. It is about a mile and a half.

Q. About a mile and a half. Now, you indicated that you parked your vehicle on Albemarle Street short of the intersection where Albemarle and Wisconsin meet, is that correct? A. Not exactly. It was just before the intersection of the street that runs in front of the high school, I believe that is Fort Drive.

Q. I believe you are right, I believe it is Fort Drive.

Mr. Cashman: Your Honor, may we make use of the board for the clarification of the hearing?

The Court: Yes.

(At the board:)

Mr. Cashman: This is just the figure indicating
120 generally north, Mr. Krill. Now, we will suppose
that this is Wisconsin Avenue and this is Albemarle
Street. Now, you said there was another street called Fort
Drive, is that right? A. Yes. That is to the south of that
intersection, there is one roadway, to the north of that
intersection it is a double roadway.

Q. I see. So this is the one roadway here, you would
say? A. Yes sir.

Q. And you said there is a double roadway to the north
of the intersection, is that correct? A. That is correct.

Q. Now, as I understand your testimony, Mr. Krill, you
said you parked your vehicle just short of the double road-
way, is that right? A. That is right.

Q. Would it be fair to say that you parked your vehicle
right here? A. That is the proper spot, the last one before
the roadway.

Q. Now, this is the Tenley Liquor Store, is it not, or
there is a liquor store? A. There is a liquor store
there.

121 Q. Located on that corner, and over here we have
the Peoples Drug Store, is that right? A. Yes, sir.

Q. And that occupies both frontage on Albemarle Street
and on Wisconsin Avenue, is that right? A. That is
correct.

Q. Now, Mr. Krill, when you drove up here, I understand
that you were the driver of the vehicle and your wife was in
the right front seat, is that right? A. That is right.

Q. And once you got out of your vehicle, would you in-
dicate what you did? A. I alighted and walked in front of
the car around to the sidewalk.

Q. I see. And then you walked along the north sidewalk
of Albemarle Street, is that right? A. That is right.

Q. Then, as I understand your testimony, you crossed

from north to the south of Albemarle and you entered the Peoples Drug Store, is that right? A. That is correct.

Q. And once you had made your purchases there, you exited the front door, turned to your right and
122 headed back down in that direction, is that right? A. That is right, on the south sidewalk.

Q. On the south sidewalk, yes, that is along this sidewalk as distinguished from the sidewalk here which is the one you negotiated on the way up to the drug store? A. That is correct.

Q. Now, Mr. Krill, with respect to the difficulty that you had using the north sidewalk, it was covered with ice and snow, was it not? A. Yes, it was.

Q. And would you say there was about three or four inches of snow on the sidewalk? A. That is not exactly correct. The sidewalk had been trodden into frozen slush, more than three or four inches of snow.

Q. But the slush that had been trodden into, that measured roughly three or four inches, did it not? A. Yes, sir, that is my estimation.

The Court: Are you talking now about the north side?

The Witness: On the north side.

The Court: That is the side that you went to the drug store and went toward Wisconsin Avenue on?

The Witness: That is correct, Your Honor.

123 Mr. Cashman: That was the nature of the question, too, Your Honor, I was referring to the north sidewalk.

By Mr. Cashman:

Q. Now, Mr. Krill, did your wife remain in the automobile? A. Yes, she did.

Q. Did she remain in the automobile until she drove the car up next to where you had fallen after you had your accident? A. No, I believe she came up to the scene and then went back and got the car.

Q. I see. She came up to the scene, then went back on foot and then drove the vehicle up? A. Yes.

Q. Now, Mr. Krill, you have described that there was a pathway on the sidewalk that had been tramped out by apparently pedestrian travel, is that right? A. Yes. You refer now to which sidewalk?

Q. I am referring again to the north sidewalk. A. Yes.

Q. And this was true of the south sidewalk also, was it not? A. To a lesser degree, yes. The north sidewalk had evidently been used more and was, well, the ice wasn't quite as thick there or as wide spread on the north sidewalk.

124 Q. As it was on the south sidewalk? A. Yes.

Q. Now, approximately how long did it take you to walk from your vehicle to the Peoples Drug Store? A. Oh, I would think not over two or three minutes.

Q. Now, the front of the Peoples Drug Store had been shoveled, had it not? A. Yes, it had; diagonally in front of the door, it had been.

Q. And this door that allows you to enter the Peoples Drug Store is a door that faces cater-corner, does it not, on the southeast corner of the intersection? A. That is correct.

Q. Now, how long did you remain in the drug store, Mr. Krill? A. I would think seven or eight minutes. I was not waited on immediately but I didn't have to wait very long because there were very few people in the store.

Q. And Mr. Krill, what was it you said that you bought at the drug store? A. Some stamps, postage stamps and razor blades.

Q. I see. And your wife remained in the automobile, apparently, throughout the time that you were in the
125 drug store? A. Yes, sir.

Q. Now, when you left the drug store, did you leave with anybody, was there anybody departing the drug store with you or did you walk out by yourself? A. I walked out alone.

Q. And when you turned right on the south sidewalk in an attempt to go back to your vehicle, was there anybody walking in front of you at all? A. No, there was not.

Q. I see. There was no pedestrian traffic on the sidewalk at the time? A. None that I recall, it was very quiet at that time.

Q. Now, Mr. Krill, what would you say the visibility was at the time? I understand it was approaching dusk, is that right? A. That is right, it was after sundown and it was a gloomy day, so it was approaching dusk at the time.

Q. Would you say there was good visibility, however? A. Yes, reasonably good visibility.

Q. Now, Mr. Krill, in the time that you have had this accident and the time to the present, have you ever gone back to the People Drug Store and inspected the scene of
126 your accident? A. I have driven by there a number of times and only yesterday did I take a look at it with anything in mind, just to refresh myself, but it is so changed now that it is entirely different than it was then.

Q. Peoples Drug Store has been redesigned? A. It has been redesigned.

Q. And you say that the only time that you went back to look at the scene of the accident, apart from whatever incidental driving you may have done by the scene, was yesterday, is that right? A. That is correct.

Q. Did you go out with your wife yesterday? A. Yes.

Q. And when you went out, did you get out of your automobile? A. We did yesterday, yes, sir.

Q. Did you wife get out also, Mr. Krill? A. Yes, she did.

Q. Mr. Krill, in the time that has elapsed since you had your accident, have you talked about the scene of the accident with your wife? A. Yes.

Q. Would you say that would be frequently or in-
127 frequently? A. Well, not frequently, there was no particular reason to discuss it in detail.

Q. Well— A. We usually mentioned it at the time of driving past, that this is where the accident occurred, but this was more or less incidental conversation.

Q. With respect to the then impending lawsuit, with which we are now presently concerned, did you have any discussions with your wife concerning the accident? A. Well, yes, of course.

Q. Now, Mr. Krill, how much of an area had been cleared in front of the Peoples Drug Store that you recollect from your experience there on the 24th of December, 1962? A. As I recall, there was a pathway about ten feet wide which ran diagonally from the intersection to the doorway, because the doorway is in the corner of the building.

Q. So then it ran from the front of the store out to the curb, would you say? A. Yes.

Q. And as you indicated, the door sits on the very corner of the intersection here and so the path would run out to the point of intersection of the curb of Albemarle and 128 Wisconsin, would that be fair to say? A. That is correct.

Q. Now, was the snow cleared to the extent that you could look down on the sidewalk and see the cement? A. Yes, it was, in that area it was quite clear.

Q. Can you tell me whether or not there was any sand placed there or perhaps salt or other abrasive? A. No, I believe there was not. I remember nothing on the sidewalk except the sidewalk itself.

Q. Now, Mr. Krill, was it snowing at the time you paid this visit to Peoples Drug Store? A. No, it was not snowing.

Q. I understand you to have testified that you were wearing a tweed overcoat, is that right? A. Yes, sir.

Q. And did you have a hat on? A. I had a hat on.

Q. And it is also my understanding that you were wearing just your ordinary shoes? A. That is correct.

Q. You were not wearing galoshes or rubbers, is that right? A. No, I was not, at that time.

Q. Mr. Krill, were you carrying anything in your
129 hand other than the purchases that you made at
Peoples Drug Store, as you departed the store? A.
No, sir.

Q. Now, once you left the store, I understand you turned
right and started back on the south sidewalk of Albemarle
Street to your car, is that right? A. That is correct.

Q. Now, Mr. Krill, how far would you have traveled
before you began to encounter snow and ice on the side-
walk? A. My best recollection is that I walked out the door
into a cleared and lighted area and then I walked into the—
down the south sidewalk. I can't say with any exactness
how far I had walked. I had said in my deposition that it
was five or six steps, strides might be a better way to put it.

Q. I think you did describe it as five or six strides, yes,
sir. A. So I would say twenty or twenty-five feet.

Q. Now, is this the distance that you walked in toto or is
this the distance that you would have had to have walked
before you encountered snow and ice on the sidewalk? A.
No, that is the total distance.

Q. I see. A. That is the total distance. Now, I
130 would say the distance in the cleared area from the
door was probably not more than five feet because,
as I recall, it was sort of a wedge shape, it ran from the
door out to the intersection, I believe it was about ten feet
wide. So as I came out the door, I wouldn't have had
very much cleared area.

Q. Are you telling us now, Mr. Krill, that the total dis-
tance that you walked from the entrance of the Peoples
Drug Store is approximately twenty-five feet? A. Well, I
can't be that exact. I wouldn't say that it was twenty-five
feet, I think the twenty-five or thirty feet would be into the
icy area and that I was somewhat further than that away
from the door.

Q. I see. How much further, would you say? A. Oh,
another ten feet.

Q. So that would mean that you were approximately forty-five feet, then, away from the entrance to the front door of Peoples Drug Store, would that be a fair statement?

A. I think that would be correct, although these distances, of course, after this length of time and trying to recall, when I had no reason at the moment to recall, are not very exact, I am afraid.

Q. With respect to the building that is Peoples Drug Store as it fronts on Albermarle Street, would you
131 say that you were closer to the front entrance of the store when you fell or would you say you were closer to the end of the building when you fell? A. I was closer to the end of the building.

Q. How far from the end of the building would you say you were? A. Well, I really have no way of gauging this very accurately, but I'd say maybe twenty feet, but I really don't know.

The Court: Twenty feet from the end?

The Witness: From the end of the building.

By Mr. Cashman:

Q. You were twenty feet from the end of the building?

A. That is an approximation.

Q. Mr. Krill, when you fell, you slipped, is that right?

A. Yes, sir.

Q. And you had walked how far into this snowy and icy area, approximately, twenty-five feet? A. Well, my approximation is maybe twenty-five or thirty feet.

Q. I see. Now, as I understand your testimony, you indicated that you followed a path that again apparently had
132 been worn down by pedestrian traffic on the south sidewalk of Albemarle Street, is that right? A. That is right.

Q. About how wide was the path?

The Court: How wide is what?

Mr. Cashman: The path.

The Witness: Oh, perhaps two feet.

By Mr. Cashman:

Q. About two feet wide? A. Yes.

Q. And you indicated that it was frozen? A. Yes, sir.

Q. And what was the temperature at this time? A. I don't know exactly but I am sure it was below freezing, it was cold.

Q. You would say it was below freezing? A. Yes.

Q. Now, Mr. Krill, you don't deal regularly at this Peoples Drug Store, do you, it is some two miles from your home? A. No, we did not regularly deal there, we only occasionally went to that store at that period of time.

Q. When was the last time you were at the store prior to the time that you had your fall, if you remember? A. I don't remember, but it must have been several months
133 before that.

Q. Now, Mr. Krill, you said that after you had fallen, that a lady came by to give you some assistance, is that right? A. That is correct.

Q. And what did she do for you? A. She walked across the street from the north sidewalk or at least from the north area and asked if I was hurt and I said I believe I am.

Q. What did she do, did she help you to your feet? A. No, she did not. She said: Can I do anything for you? And I said: Yes, would you tell the lady in the green car parked on the other side of the street that I have fallen and ask her to come here and she said she would do that.

Q. And that is when your wife came to the scene, is that right? A. Yes.

Q. You say where you fell was nearby a telephone pole, is that right? A. Yes, I have a recollection that it was not far from a telephone pole.

Q. I see. Now, would this be the first telephone pole that a person would encounter as he walked along the path that you were walking along, that is on the south
134 side of Albemarle or would it be the second telephone pole, or do you have any idea? A. Well, I don't

know how many poles there are there, so I don't know which one it would be.

Q. Now, I understand also, Mr. Krill, that two young gentlemen came to your assistance, is that right? A. That is correct.

Q. Let me backtrack a second and ask you if you obtained the name of the woman who came to your assistance, did you ever get her name? A. No, we did not, because when my wife came up, the lady walked away, she didn't come back, she went back to whatever place she came from. I think there was a car waiting for her, I have some recollection that she was going to get in a car across the street.

Q. You did make an attempt and did obtain, did you not, the names of the two young men who came to your aid? A. Yes.

Q. And as I understand your testimony, at a later date you either lost or misplaced these two names? A. Unfortunately, that is true, we did.

Q. Have you been in touch at all since the time of this accident with the two gentlemen who tried to help
135 you out? A. No, I have not, I would be very happy to know how I could get in touch with them.

Q. Mr. Krill, isn't it a fact that you had walked into this icy area quite without realizing that you were in an icy area? A. That is quite right.

Q. Can you explain to the Court and the ladies and gentlemen of the jury why you didn't realize where you were walking or where you had been walking? A. Because when I came out the door, the small area there was cleared, I just strode along the small area and walked down that sidewalk to go back to the car. There is a crossover at the end of that Fort Drive and because the north sidewalk had been so bad, I thought perhaps it would be better on the south side.

Q. I see. But you did walk into the snowy and icy area five or six strides before you realized where you were walking, is that not true? A. That is correct, that is right.

Q. And when you fell, Mr. Krill, you slipped, did you not? A. Yes, sir.

Q. Now, Mr. Krill, could you tell whether or not
136 you were walking along the public sidewalk part of the area in question or were you walking near the building or just exactly where were you when you were walking along? A. I was walking on the sidewalk area, I am sure, because it was not near the building and it was not near the curb.

Q. I see. How far from the curb would you say it was? A. It must have been about six feet.

Q. About six feet from the curb? A. Yes.

Q. Now, Mr. Krill, you said that the front of Peoples Drug Store had been shoveled off? A. Yes.

Q. For an area that you estimate to be about ten feet running from the door out to the curb? A. Yes.

Q. That is right, isn't it? A. That is correct.

Q. Now, Mr. Krill, did you notice any place where snow was piled up, that is the snow that had been removed from the front of the store, do you know where that was? A. No, I saw no piled-up snow.

137 Q. You didn't see any piled-up snow at all? A. No.

Q. Did you notice whether or not there was any piled-up snow in the tree space, that is the space that is next to the sidewalk and also adjacent to the curb where trees are generally planted, where the telephone pole would be located, did you notice any piles of snow there? A. I didn't notice and there wasn't any at the point where these boys carried me to the car, there was no piled-up snow.

Q. There was no piled-up snow? A. No, sir.

Q. Now, Mr. Krill, would you say that the snowy and icy conditions, that is, as they appeared to you, with footprints in them along the north sidewalk and the south sidewalk of Albemarle Street, were generally indicative of the prevalent conditions that existed in the City generally? A. Well, no, I don't think they were because while I didn't get out of the car at the friend's house on Chesapeake

Street, the walk was cleared at that point, at least there was an area cleared, the streets were not covered with snow and ice except in protected places.

Q. I did understand you to say that there was ice
138 on the roadway in patches? A. In patches and protected areas, yes.

Q. And you indicated that there was a path that had been tramped out on the north side of Albemarle Street, from your experience of walking along that north side, is that right? A. That is correct.

Q. And you said there was also a path that was tramped out on the south side of Albemarle Street, as you were returning to your car when you had your accident, is that right? A. That is also correct.

Q. Was this condition characteristic of the snow and ice conditions in the intersection in general? A. Well, to the best of my recollection, I really don't know because I just walked up and walked across and down Wisconsin, the Wisconsin sidewalk at least at that intersection was clear and it was clear crossing the street right at the intersection.

Q. When you used the crosswalk? A. When you used the crosswalk, yes.

Q. But the sidewalk is what I was referring to. A. The sidewalk was not clear on either side.

Q. On either side, and on both sides it had a path-
139 way that had been tramped out, isn't that right? A. That is right.

Q. Mr. Krill, I believe you indicated on direct examination that you were located about twenty to—pardon me, ten to twelve feet from a downspout? A. That is my recollection, yes.

Q. Now, Mr. Krill, do you recall the time that you and your wife and a representative from Mr. Frosh's office appeared at Mr. O'Donnell's office and you gave sworn testimony regarding this accident? A. Yes, I do.

Q. You remember I was present? A. You were there.

Q. As was Mr. O'Donnell.

Mr. Cashman: I am referring, Your Honor, to page 54 of the deposition of Mr. Krill which was taken November 1, 1963.

By Mr. Cashman:

Q. And Mr. Krill, you remember the following questions and the following answers:

“Q. Mr. Krill, I have one question regarding the incident itself: In terms of feet, how far from the downspout on the building were you when you suffered your fall? What was the distance from you to the
140 downspout that you mentioned earlier in your deposition?”

“A. Well I can only guess at this, but I'd say twenty feet.

“Q. Twenty?”

“A. Twenty or twenty-five feet.

“Mr. Cashman: I have no further questions.”

Now, Mr. Krill, you have indicated now that you think that you were ten to twelve feet away from the downspout. Which impression is correct? A. Well, I think the present one is probably correct but I must point out, as I did earlier, that these are only approximations because I had no reason to gauge the distance, and the passage of time has dimmed the memory to some extent, but I believe that ten or twelve feet is correct.

Q. Despite the fact that when you took this deposition, it was in November of 1963 and it was much closer in time, was it not, to the accident than the time we are now considering? A. That is true, but as long as you are only taking an approximation, I don't think that you could be very exact if you did it repeatedly.

141 Q. Mr. Krill, is there a downgrade on the south side of Albemarle Street? A. I believe there is a very slight one.

Q. You think there is a slight grade? A. Yes, it is my recollection there is a slight downgrade.

Q. And in the direction in which you were walking, you would be following the downhill slope of the grade, would you not? A. Yes.

Q. You wouldn't be walking up against it? A. No, the grade runs down in the direction in which I was walking.

Q. In the direction in which you were walking. Mr. Krill, is it fair to say that you really don't know the precise spot where you fell? A. Well, I can't tell you the precise spot, no, because I have no way of knowing exactly where I fell.

Q. Mr. Krill, you said that when you fell that you weren't paying too much attention to distances involved, and that is understandable. You did, however, obtain the names of the two young men who came to your assistance, is that not right? A. We obtained that name, though, after they had taken me to the car.

142 Q. After they had taken you to the car? A. Yes, as they had helped me into the car.

Q. And you were unable to get the name of the lady who came to your assistance, is that right? A. No, I really didn't think of that at the moment and she didn't come back, she went on about her own pursuits.

Q. Mr. Krill, once you arrived at the hospital, did anybody interview you while you were there in the Emergency Room, for example? A. No, I have no recollection of that, just the doctors were there.

Q. Just the doctors. Did you give the history of this incident to an admitting personnel or to doctors when you went to Sibley? A. I don't remember now. I don't believe I gave any information to the admitting personnel, but I don't really recall now.

Q. Do you recall whether or not you described the accident to the doctors who were treating you? A. Not in detail except to say that I had fallen on the ice and that was the cause of the injury.

Q. Yes. Now, it is true, is it not, Mr. Krill, that the police phoned you to verify if you were the Mr. Krill who had reportedly fallen on the sidewalk at the southeast corner of Wisconsin and Albemarle?

143 A. That is correct.

Q. Do you happen to know the name of the police officer who called you? A. No, I do not. I think he identified himself on the phone but I didn't make a note of his name.

Q. Would you know it if you heard it again? A. No, I wouldn't now.

Q. Mr. Krill, it is a fair statement to say that you slipped on the snow and ice, is that right? A. That is correct.

Q. Your feet went right from under you, did they, Mr. Krill? A. Yes, sir.

Q. And did both feet go out from under you or did you lose your balance because one foot went out? A. No, both feet.

The Court: At this time, we will take a recess of five minutes.

(A short recess was taken.)

By Mr. Cashman:

Q. Mr. Krill, it is a fact that as you were walking along the south sidewalk of Albemarle Street, after you had departed from the drug store, that you were walking with your eyes down on the sidewalk? A. I don't remember that, I assume I was looking about in the manner that you normally would if you were walking on a sidewalk.

144 Q. Perhaps I can refresh your recollection. Mr. Krill, with respect to the deposition about which we spoke earlier—

Mr. Cashman: Your Honor, I am reading from page 27.

By Mr. Cashman:

Q. The following questions were asked and the following answers were given, from line 9:

"Q. Mr. Krill, as you were walking along, were you watching where you were walking?

"A. Yes, sir.

"Q. You were?

"A. Yes, sir.

"Q. Were you looking down or were you looking up—that is, were you walking with your eyes on the sidewalk as you remember?

"A. Yes, I was at that point."

Now, does that refresh your recollection? A. Yes, it does.

145 Q. So, as you were walking along, you were walking with your eyes on the sidewalk as you were so proceeding? A. Yes.

Q. Now, Mr. Krill, you said there was a pathway that was shoveled out in front of the drug store that ran from the entrance to the curb? A. Yes.

Q. And that was approximately ten feet wide? A. Yes.

Q. And you say after you left that, you encountered snow and ice and I think your testimony is that it was more in the nature of frozen slush rather than fresh snow, is that right? A. That is correct.

Q. Now, if you had turned to your left and you had left the pathway, would you have encountered snow and ice in that condition on the Wisconsin Avenue side of Peoples Drug Store? A. Well, I don't know. I didn't go that way.

Q. Well, the pathway that was shoveled, there was obviously snow on one side of it, was there not snow on the other side, on the Wisconsin Avenue side of it? A. Well, I don't remember that, there was just a pathway diagonally up to the door, so I don't know whether there was snow on the Wisconsin Avenue side or not, beyond the door.

146 Q. Well, Mr. Krill, if there was a shoveled pathway, it would appear that there was snow on both sides of the path, otherwise there would not be a pathway. Your memory doesn't serve with respect to Wisconsin

Avenue? A. No, it does not, although you are correct, I have the impression there was a pathway but I really don't remember what the condition was of the sidewalk on Wisconsin Avenue.

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154 Cross-Examination

By Mr. O'Donnell:

Q. Mr. Krill, in your capacity with the Secret Service, have you ever had occasion to testify in any case before a Court or jury? A. Yes, sir.

155 Q. Do you consider this frequently, when you were in the field, so-called? A. Not frequently, but fairly often during the year because we deal in many types of criminal activities in which there were often criminal cases in court.

Q. So testifying in court is not something that is unusual for you personally? A. No, it is not.

Q. This deposition, that Mr. Cashman has referred to, was taken about ten months after your fall, isn't that correct, November 1, 1963, the fall was December 24, 1962? A. Yes, sir.

Q. And it has now been, since your fall, approximately three and a half years, isn't that correct? A. That is correct.

Q. Now, generally, wouldn't it be fair to state that your recollection in November of 1963, ten months after the occurrence, would be better than it is today? A. As a general statement that would be correct.

Q. Now, it is my understanding that you used to live somewhere in the vicinity of this store before you moved out in Maryland, is that correct? A. That is correct.

156 Q. And at one time you were a frequent customer of this store, prior to moving to Maryland? A. That is right and we traded there quite often.

Q. And you knew the general layout of the intersection and the layout of the land as far as up and down and

which side was north and which side was south, isn't that correct? A. That is right.

Q. Have you had an opportunity to review the Weather Bureau reports for December 24, 1962? A. I have not reviewed them, no, sir.

Q. Do you know, of your own personal knowledge, whether at any time that day it went over freezing? A. I don't know personally whether it did or not, it must have been close to freezing.

Q. The entire day? A. I recall it as a cold day.

Q. And I think you stated that the snow on the ground at that time, generally throughout the City except in those areas that were cleared, was somewhere between three and four inches, isn't that correct? A. That is correct.

Q. And as a matter of fact, the snow and slush that had frozen on the north side of Albemarle Street, as you
157 walked up prior to going into our store, was about three or four inches of snow, isn't that correct? A. That is correct.

Q. And the snow and ice that you encountered on the south side was even deeper, is that correct? A. Well, I don't know that it was deeper but it was approximately the same as that on the north side, maybe more widespread.

Q. It would be fair to say, wouldn't it, that the snow adjacent to the Peoples Drug Store on the south side of the street would be slower to melt than the snow on the north side because it would be in the shade during the day? A. Yes, at least part of it would.

Q. And you were aware which side of the street was the north side and which side of the street was the south side, isn't that correct? A. That is right.

Q. Now, I would like to clear up one thing in my own mind. It was my recollection that you testified on direct examination that the visibility was poor, but then when you testified in response to Mr. Cashman's question, you said that it was good, it was near dusk. Was the visibility

in fact good as you left the store and turned to the
 158 right and walked down Albemarle Street? A. Well,
 I think this is a choice of terms. At dusk, I wouldn't
 say the visibility was good, but I wouldn't say it was bad
 either, it just was not maximum visibility. It wasn't full
 daylight nor was it dark, so I don't know just how to ex-
 press it, I wouldn't say it was good nor bad.

Q. Would it be fair to characterize it as reasonably
 good visibility? A. I think that would be a good term,
 reasonably good.

Q. Your wife drives, isn't that correct? A. That is
 correct.

Q. And you had parked the car a considerable distance
 away from the store, a block away as indicated there on
 the diagram? A. Yes, although it is a short block.

Q. And as I understand your earlier testimony, you
 stated that traffic conditions were light, pedestrian traffic
 was light, isn't that correct? A. That is right, there were
 few people about.

Q. Was there any reason why on Christmas Eve, with
 the conditions as you saw them and knew them on the
 street, that you couldn't have driven your car up to where
 that liquor store has been identified or even double
 159 parked and crossed the street directly instead of
 crossing one street, going up one north sidewalk as
 you indicated, that had three or four inches of frozen
 slush, and then cross an intersection and go into our
 drug store? A. Well, the reason was—

Q. No, I am just asking you this question, you could
 have done that, couldn't you? A. No.

Q. You could not have? A. No.

Q. On Christmas Eve, there's no way up there you could
 double park? A. If you did, you'd be in the roadway
 because the roadway is only two lanes wide at that point.

Q. Well, let's assume up here where this liquor store is
 located—is there parking up in this area? A. No, sir,
 there is no parking on that side of the street.

Q. You could have driven up there and slid into the curb and your wife could have slid into the driver's seat and had the motor running, like most of us do, not going in a liquor store, wherever we go, you could have
160 done that, couldn't you? A. You could, but you would have blocked all the traffic if you had.

Q. But there was no traffic there at the time, as I understood you earlier to say.

Now, are you certain in your own mind today that you in fact used the north sidewalk? A. Oh, yes, sir.

Q. And do you remember at your deposition ten months after the accident whether or not you were certain, absolutely certain that you had used the north sidewalk? A. I don't recall exactly what the deposition said at that point. But I am certain that I used the north sidewalk.

Q. You are certain today? A. Yes, sir.

Q. Well, would your recollection have been better in November of 1963 on this point? A. Well, I can't say about that, I don't know, I assume that it would have been.

Q. Have you had an opportunity to read this deposition recently? A. Yes, I have read it.

Q. Do you recall a place on page 5 when a question was asked of you:

161 "Q. Parked on the north side; and when you got out of the car, did you proceed immediately across the street, or did you go up to Wisconsin Avenue to cross?

"A. I'm not altogether sure, but I believe I went up to Wisconsin Avenue to cross."

Now, there you said you weren't altogether sure, but today you are sure, is that correct? A. That is correct.

Q. When you walk, Mr. Krill, approximately how wide is your stride? A. Well, I don't know exactly, I think I walk with a normal stride for a person of my height but I don't know what that would be in feet.

Q. Would it be fair to say that the average human stride is around two and a half feet? A. I think that is a general

characterization, unless you are a very tall person, I think about two and a half feet is correct.

Q. Now, when you used the north sidewalk, you knew that the condition there was dangerous, isn't that correct?

A. Yes, sir, it was bad.

Q. And actually, as you proceeded along the north sidewalk, it was a gamble walking on the north sidewalk, a gamble that you weren't going to slip, isn't that correct? A. Yes, that is true, there was some danger in it.

Q. And you also knew the area at that time and you knew at that time also that snow melted slower on the south side than on the north side, isn't that correct? A. That is right.

Q. And as I recall your earlier testimony, you said the street, although it had icy patches, was clear, you could have walked down the street safely, isn't that correct? A. That is true.

Mr. O'Donnell: Your Honor, may I go to the board? I drew a little diagram at recess.

The Court: Yes.

(At the board:)

By Mr. O'Donnell:

Q. Now, Mr. Krill, I am not as good a drawer as Mr. Cashman, but let's assume—

Mr. Cashman: I resent that, Your Honor.

(Laughter.)

By Mr. O'Donnell:

Q. Let's assume for the purposes of our discussion at this time that this is Wisconsin Avenue going north, here is our friendly liquor store, this is Albermarle Street going east and west; and let's further, for the purposes of discussion, assume that this is our store.

Now, from your recollection and your understanding of this area at the time of this fall, there was a front door here that faced cater-corner across to Sears, is that right?

A. That is correct.

Q. And this entire area down here that I am pointing to is sidewalk, is that correct? A. Yes, sir.

Q. And then down a certain distance there is a grassy area, which we referred to as public space owned by the District? A. Yes, sir.

Q. And this is all grassy area, and this is the normal sidewalk, and this is the tree box space, isn't that right? A. That is correct.

Q. Now, my understanding of your testimony is that we had a path that was shoveled and cleared to the sidewalk in front of our door going to this cater-corner here? A. That is correct.

Q. Let's assume for purposes of discussion that this is our front door, and say our front door is approximately how wide? A. Oh, I believe ten feet wide.

Q. All right, so then this, crudely, is the cleared pathway? A. That is right.

Q. And you had come up this sidewalk, crossed into our cleared pathway and entered our store, is that correct? A. That is correct.

Q. And then when you left the store, you walked out into this area here, right? A. That is right.

Q. And somewhere in here (indicating). Did you immediately turn right? A. Yes.

Q. And your car is parked down here and over, right? A. That is right.

Q. Now, as I recall your testimony, you said you took-- and this is the area that is all icy and snowy, clear down? A. All of it, yes, sir.

Q. And you took five or six strides, is that correct-- from the door or five or six strides after you left here (indicating)? A. Well, from the edge of the cleared area, I think.

Q. All right. So you took five or six strides and
165 you would say the average person's stride is approximately two and a half feet? A. Two and a half feet, something like that.

Q. Now, am I recapping your testimony correctly, Mr. Krill, that when you left our store, you turned down Albemarle Street and you took approximately five to six strides into this area that was completely ice and snow? A. Yes, sir.

Q. And the first time that you noticed that there was ice and snow there was after you took five or six strides, isn't that correct? A. That is right.

Q. And it was approximately that time that you fell down? A. That is right.

The Court: Were there any doors to this store other than that door that you went in?

The Witness: I don't know of any other doors, Your Honor.

Mr. O'Donnell: Your Honor, I might say that there are no other doors and we will have testimony to that later on.

By Mr. O'Donnell:

166 Q. Now, the particular part of the area that you were walking in was an area where people had walked through before and had made hummocks, I think you described them? A. Yes, sir.

Q. What is a hummock? A. Oh, a little ridge of ice or a little rounded ridge of ice.

Q. So if I put my shoe in the slush, that slush that comes up alongside of my shoe and freezes, that would be a hummock? A. That is what I would call a hummock, yes, sir.

Q. And was it your feeling after this, or your conclusion that you had stepped into one of these hummocks and slipped and fell? A. Well, I can't really be that exact, my

feet flew out from under me and it is an assumption that this is the case.

Q. Would it have been safer for you to have walked on the area that had not been trodden down the way this particular path was trodden down? In other words, there wouldn't have been as many hummocks say, for example, in the grassy area or in the tree box space? A. Well, this is only assumption, perhaps not, I was trying to follow the path that was normally used, so I don't
167 know about this.

Q. But you knew this condition all along there was dangerous, is that correct? A. It was all covered with ice and snow.

Q. No, my question was that you knew it was dangerous, that there was a chance or risk that you might slip? A. Well, I didn't know this until I walked into it, because I hadn't been past that area.

Q. Well, if you had known before you had walked into it that it was ice and snow there, would you have walked into it? A. No, I would not.

Q. You would have gone back a safer route, isn't that correct? A. Yes.

Q. Now, you mentioned a downspout. I think you mentioned it was at the end of our building here, is that correct? A. It is near the end of the building, I am not certain it was at the end but it was right close to the end; if it wasn't on the end, it was right close to it.

Q. Somewhere in that area? A. Somewhere in that area, yes.

Q. Now, do you recall specifically seeing that down-
168 spout on this evening? A. Yes, I do, I saw the downspout.

Q. Do you recall seeing any water dripping from it? A. I didn't see any water drip from it.

Q. Do you know who owns that downspout? A. No, I do not.

Q. Do you know who owns this building? A. No, I do not.

Q. There are other stores, or were at that time, shops down in this area, isn't that correct? A. Yes, I believe there were two other stores there.

Q. Just to get this clear in my own mind, you don't know, as a matter of fact, whether that was our drain pipe, isn't that correct? A. It is on the building in which Peoples has its store, as I saw it.

Q. In other words, you looked right up and saw that it went to our roof here? A. I can't say that I looked up and saw it, but it was on the side of the building opposite or nearly opposite where I fell.

Q. Do you know whether it was even functioning? Did you see it function, or did you ever go back and inspect it as to whether it was functioning? A. No, but there was evidence—

Q. Now, was this a one-story building? A. Yes, sir.

The Court: Did I understand you to say that there were other stores there on the south side?

The Witness: They are behind the Peoples store, Your Honor, a little further down Albemarle, below the area where I fell.

The Court: Isn't it residential beyond the intersection, the first intersection?

The Witness: You mean beyond Fort Drive?

The Court: No, beyond the first intersection, the first intersection you get to when you go from the drug store on the south side?

The Witness: It is residential on the east side of those intersections, but just behind Peoples Drug Store before you come to the Fort Drive intersection, there was a furniture store and I believe there is a building entrance or maybe there was another store, I have a recollection that there used to be two stores there, before you get to Fort Drive.

The Court: Fort Drive is the first street, is it, that you get to in going east from Wisconsin?

170 The Witness: It is either Fort Drive or 40th Street, because there is a double street on one side and a single on the other.

Mr. O'Donnell: May I proceed, Your Honor?

The Court: Yes.

By Mr. O'Donnell:

Q. Now, after you fell, you were stunned, isn't that correct? A. Yes, momentarily, yes.

Q. And I think you also stated, and correct me if I am wrong, that you offered some shock? A. Yes.

Q. And this was a very exciting moment, there was a lot of excitement? A. Well, at that moment, I don't know whether exciting is the right term but it was momentarily a shocked and stunned condition, but I was certainly aware of my surroundings.

Q. Well, I use the word excitement the way you characterized it in your deposition on two occasions on page 16.

A. Well, ensuing excitement, yes, because of the lady who paused and Mrs. Krill coming up, and so forth.

Q. Now, you went to Sibley Hospital and while at Sibley you told us you met Dr. Baker, is that correct? A.
171 That is correct.

Q. What are his initials, do you know? A. Dr. W. P. Baker or Wyrth P. Baker, W-y-r-t-h.

Q. And did you tell him how this accident occurred? A. I believe my wife told him. I had no recollection of whether I told him personally or not.

Mr. O'Donnell: May I have the Sibley Hospital records marked for identification?

The Court: Yes.

The Clerk: Defendant's Exhibit No. 1 for identification.

(Sibley Hospital records were marked Defendant Peoples Exhibit No. 1 for identification.)

By Mr. O'Donnell:

Q. When you use the expression "in front of" a place, would it be fair to say in connection with this Peoples Drug Store that in front of Peoples Drug Store would be in front of the front door? A. If you were specific, yes, but if you are making a general statement, I don't know that you would be that explicit, I think most anywhere around the drug store would be.

Q. This would be the front? A. No, it would not.
172 Q. This would be the rear? A. That is right.

Q. So it would be up in this area, right? A. Yes.

Q. That would be the front. What would this area be called here? A. Well, that would be the side of the store.

Mr. O'Donnell: Now, I would like at this time, Your Honor, to read a history which is signed by—

The Court: Have you shown it to Mr. Frosh?

Mr. O'Donnell: I believe he has seen it, Your Honor (handing to Mr. Frosh).

Mr. Frosh: I have no objection to the admission of the records.

By Mr. O'Donnell:

Q. Now, these initials appear to be W. M. B. which I believe are Dr. Baker's initials? A. It is W. P. B., are his initials.

Q. Well, it looks like a typical doctor's writing. A. If you can read it at all.

Q. And under history of present illness—

Mr. Frosh: Is counsel asking that the records be admitted? I have no objection.

173 Mr. O'Donnell: I don't want them admitted at this time, Your Honor. I would like to read from them, though.

The Court: Isn't there something in the pretrial about using them?

Mr. O'Donnell: Yes, without formal proof.

By Mr. O'Donnell:

Q. Now, under history of present illness, it says: Fell on icy sidewalk, Albemarle Street, in front of Peoples Drug Store at Wisconsin Avenue.

Now, it is your testimony that you do not recall making a statement to this effect to Dr. Baker and it could have been Mrs. Krill? A. It might have been Mrs. Krill, I don't recall it.

Q. Now, Mr. Krill, you told us after the accident, you had this pin put in your leg and a plate put in your leg, and you went home for a certain period of time, then you went back to work first for an hour a day, then an hour or two, then four or five hours a day, and then in the summer of 1963, about eight months after the accident, you had this infection that came up on your hip? A. That is correct.

Q. And at that time when this infection occurred, 174 were you back at work? A. No. I had taken a few days off because I was having a great deal of pain and trouble with the leg.

Q. No, my question was: Were you back at work? A. Oh, you mean working generally?

Q. Yes. A. Yes, not full time.

Q. Not full time, you say? A. That's right.

Q. And then after this abscess was taken care of at Sibley Hospital, the following January which would have been thirteen months after the accident, isn't that correct, the doctors went in and took out what they called the hardware, the nail and the pin? A. Yes, but it was the following February. I think the other day I inadvertently said the second operation was in January but it was really in February, the first one was in December 1962.

Q. Now, in February of 1964, that is thirteen months, fourteen months after the accident, you were released from the hospital and you went home. How long were you on crutches? A. To my best recollection, I was on crutches

until perhaps May and then I used a cane for a time.

175 Q. How long did you use a cane? A. Oh, maybe until the end of the month of May, up to perhaps the first of June. I am not clear on exact dates.

Q. So your testimony is that for at least three months you were on crutches, is that correct, after you left? A. Yes.

Q. Do you recall the last time that you saw Dr. Radice?

A. No, I don't recall now just what the last date was. It must have been sometime in the spring of 1964.

Q. Would it be fair to say that the last time you saw Dr. Radice was on March 14, 1964? A. I think that is about correct, I may have seen him at a later date but I don't recall that it had any connection with the removal of the plate.

Q. You saw him on a personal matter? A. No, I saw him after that and asked him, I saw him and asked him some questions about the leg but it wasn't an official professional call, I just met him and we discussed it a moment, but it wasn't to the office. I really don't know, whatever his records show would have to stand.

Q. Well, by any chance did you ever have an opportunity to see a medical report that he wrote to Mr. Frosh, dated April 24, 1964? A. I believe I saw that report, yes.

176 Q. Do you recall a portion of that letter, which was dated April 24, 1964, which said that: "At the present time the draining sinus is completely healed and the patient is walking without the aid of a cane or crutches."

Now, that is considerably earlier than June of 1964, this is in April, and as I have a record here from Dr. Radice, which may or may not be correct, that the last time you actually had an office visit with him was March 14th, could it be that on March 14th, 1964, you were not using a cane or crutches? A. I was using a cane at that time, I know.

Q. All right. But you may not have been using crutches on March 14, 1964? A. Well, I don't have a definite recollection as to the time.

Q. But this was within a month after the operation and it was not in May, say, of 1964, as you testified here earlier? A. Well, I can't be more exact than this, because there was such a long period of it that I don't really know.

Q. As a Secret Service agent you are trained, aren't you, for specifics? A. Yes.

Q. Such things as distances and observing things
177 around you when protecting the President, and noticing anything unusual, isn't that correct? A. That is correct.

Q. And knowledge of dates is important, isn't that correct? A. That is true.

Q. But up to now, just about everything, as I understand it, in connection with this case has been an approximation, am I fair in that observation? A. I think that has to be the case because of the situation.

Q. Well, that is all I want to know. Now, this same report of Dr. Radice that I referred to earlier, April 24, 1964, had some other information in it. Did you give Dr. Radice, yourself personally, a history of how this accident occurred? A. I don't recall whether I gave him a specific history or not. He just asked me, of course, how I fell and I think he was interested in it from the medical standpoint.

Q. Well, did you tell him and I am quoting from the second paragraph of that report: A history was given that Mr. Krill had fallen on the ice in front of Peoples
Drug Store at Wisconsin Avenue and Albemarle
171-181 Street, N.W. Did you give Doctor— A. Well,
I wouldn't have said in front of, I think this is his choice of terms.

Q. All right. Could Mrs. Krill have told him that? A. I don't think she would have said that, but I don't know, I don't think she would have put it that way.

Q. Now, Mr. Krill, Friday when you were testifying in connection with medical records—

The Court: Mr. O'Donnell, it is just about time for the luncheon recess, so will you just remember where you are so you will know where to start after lunch.

Members of the Jury, we are going to have a recess now and the recess will be until 1:45. Keep in mind the usual admonition.

• • • • •

217 Q. Now, I notice on this list of items that you have made a claim at \$.10 a mile for personal car use from your home to Doctor Radice's office, is that correct? A. That's right.

Q. And Doctor Radice's office is located at Dupont Circle? A. Very near Dupont Circle.

Q. Now, that would be eight miles from your house to Doctor Radice's office, wouldn't it? A. I would think it would be something like that, yes.

Q. Well, you are making a claim for eight miles to his office, and eight miles back? A. That's right.

Q. You have read this list? A. I read the list, yes.

Q. Did you measure this by your speedometer? A. No, I didn't measure it by a speedometer. I just took an accurate estimate of it.

Q. What if I suggested to you that the mileage
218 would more likely be five miles to his office from your home, than eight miles? Would that be a fair statement on my part? A. I don't know whether it would or not. I estimated it to be eight miles. I didn't measure it. So I don't know whether you would be correct or whether I would.

Q. You really don't know. You just put this down as an estimate of what you thought it was. A. That is correct. I have a general idea of distances but I couldn't be more specific in going through a major city.

Q. Well, you have stated here it is four miles to the

Washington Clinic from your home. A. That is about right, I think.

Q. Isn't it closer to two miles? A. No, if I put down four miles, that was what I estimated it to be. I didn't measure it.

Q. Well, do you think this map would be a fair representation of the distance between your house and the Washington Clinic, and as I understand it, from your home you come out to Massachusetts Avenue—your home is only two blocks away from Mass. Avenue, approximately two blocks and then— A. That isn't true. It is four blocks.

Q. All right, four blocks. Come down to Mass. 219 Avenue and then you go straight across Western Avenue to the Washington Clinic, which is located at Wisconsin and Western? A. That's right. That would be generally the way.

Q. Do you still have that ruler?

Mr. O'Donnell: Your Honor, could I ask him to use this map for the purposes of judging distances?

The Court: Yes.

(Map and ruler handed to witness.)

By Mr. O'Donnell:

Q. Now, your home as I understand it is in a section called Sumner, isn't that correct? A. That's right.

Q. Now, this area here is referred to—this is where the Washington Clinic is located at Wisconsin and Western. A. Right near that intersection.

Q. It is right on the intersection, as a matter of fact, isn't it? A. Yes.

Q. And from your home you would come from your home here down to the circle—what is it, Westmoreland Circle? A. Westmoreland.

Q. And go straight across— A. Western Avenue.

220 Q. Would you measure that for me? Those are almost straight lines. A. That is approximately two inches.

Q. All right. A. This is approximately one and five-eighths, I guess. No, it isn't quite one and a half, and about a half inch over.

Q. So that totals about two inches, right?

Now, if you measure this on this legend, it is a little over one mile, isn't it? This is the scale of miles. A. That is right. On your map legend that is correct.

Q. So it would be closer to—if the map is correct, it would be closer to two miles than four miles? A. If the map is correct. I didn't use the map in making up my estimate.

Q. Well, you have made certain claims here and I am just trying to check them out.

Now, there is another claim here for personal car use to hospital from home and return. It says five miles each way. Is that five miles from your home to Sibley Hospital? A. I think it is near five miles. You go down to Massachusetts and up to Westmoreland and back to the hospital or you can go around the other way.

Q. So it is five miles from your house to Sibley
221 Hospital.

Now, Mr. Krill, I went by your house last night with my children and I drove from your house to Sibley Hospital by Mass. Avenue and down Loughboro Road, or it is the Dalecarlia Parkway—I am not sure which one it is there—off the circle—and my speedometer only said 2.2 miles from your house to Sibley Hospital.

Mr. O'Donnell: Now, I wonder if with the Court's permission, if Mr. Krill tonight when he goes home could use his private car and measure this distance and come back and tell us tomorrow whether it is five miles or 2.2, as he has testified to here today. I don't want to put myself on the stand.

Would there be any objection on the part of the Court?

Mr. Frosh: I have no objection, Your Honor.

Mr. O'Donnell: I just want to get this straight.

By Mr. O'Donnell:

Q. Your testimony is it is five miles from your house to Sibley Hospital. A. I estimated the distance and I still think it is more than two miles. I may or may not be correct, but I didn't measure it as you did.

Q. Are there any more of these bills that are estimated, that are not actual? A. No, sir. The bills that I
222 have there, I gave you my checks for most of the bills.

Q. That wasn't my question. Are there any other items here that you are approximating, rather than giving us specific figures? A. No. Without looking at the list I don't think so.

Q. Please look at the list. A. Let me see the list.

* * * * *

225

Ray S. Crist

was called as a witness by the plaintiff, and having been duly sworn, was examined and testified as follows:

Direct Examination

The Court: Officer, would you keep your voice up, please, so that all of us can hear you.

The Witness: Very well.

By Mr. Frosh:

Q. Your full name, please. A. Ray S. Crist.

Q. What is your business or employment, please? A. Metropolitan Police Department.

226 Q. To what precinct are you attached? A. Number Eight.

Q. Where is that precinct located? A. 4125 Albemarle.

Q. How close is that to the intersection of Wisconsin Avenue and Albemarle Streets? A. About a block.

Q. Can you describe that corner for us, please, Officer, that intersection? A. The intersection—well, it is a regular intersection with—what do you mean?

Q. What are the stores or the other business that are located there, as you recall? A. Well, on one corner we have Sears and Roebuck. On another corner we have the Public Library. On the northwest corner we have a liquor store. And on the other corner is a Peoples Drug Store.

Q. How long have you been at Precinct No. Eight? A. Just about 25 years.

Q. What are your duties or your functions there? A. I am the patrol coordinator for the Police Department working with the schools.

Q. Now, would you tell us the number of other institutions such as schools and churches that are in this neighborhood? A. Well, we have—

227 Mr. Cashman: May we approach the Bench, Your Honor?

The Court: Yes.

(Whereupon counsel approached the Bench and the following proceedings were held:)

Mr. Cashman: Your Honor, I don't know what relevance the number of churches, schools and other institutions that surround the area of Wisconsin and Albemarle has in this case.

Mr. Frosh: Tremendous relevance, Your Honor, and the relevance will be found in a close reading of the Smith case. I don't know that I need to spell it out.

The Court: The Smith case?

Mr. Frosh: On which they base their motion for a directed verdict. I don't think that I have to be more specific than that.

The Court: Well, the Smith case is the same case that dealt with the humps and ridges.

Mr. Cashman: The hillocks and the ridges, yes, Your Honor. I am familiar with it.

The Court: I had that on trial the second time after some other judge had it and it was sent back, and I had it the second time, but I don't know. These preliminary questions are supposedly leading up to something.

Mr. Cashman: Well, I don't see any demonstrable
 228 relevance between the question that he asked and
 this particular accident.

I think if Your Honor hears this officer in full, it will
 be also evident that he knows nothing about this particular
 accident, not a thing; as a matter of fact he didn't even
 know Mr. Krill was injured until he got the subpoena from
 Mr. Frosh on last Friday.

The Court: Well, I don't know what he is trying to do.
 I am familiar with the Smith case, but I don't know what
 you are trying to bring out, except they did say something
 about the conditions being—whether they were the same
 in other parts of the city.

Mr. Frosh: You Honor hit the nail right on the head.

Mr. Cashman: That is true.

Mr. Frosh: And that is what I am going to try to do
 in this particular case.

Mr. Cashman: On this particular day, I am afraid you
 can't show that, Mr. Frosh. This officer has no knowledge.

Mr. Frosh: But only testimony about the conditions at
 that place.

The Court: Well, this dealt with conditions generally
 but I think you will have to make your individual objec-
 tions. I don't believe that I can pass upon it now.

229 Mr. Cashman: Will the record show that I have
 an objection to his present question?

The Court: Yes, I will overrule that objection.

Mr. O'Donnell: Your Honor, for the record, if this is
 relevant to the District of Columbia, it is clearly not rele-
 vant to the Peoples Drug Store and I think it would be
 very prejudicial to us.

The Court: We are talking about a street.

Mr. O'Donnell: But I imagine he is trying to make a
 package deal to show conditions in the whole area, but I
 am just dealing with my clients.

The Court: I think the decision had to do with the Dis-
 trict of Columbia.

Mr. O'Donnell: That is right.

I am worried about testimony that is not proper against me but might come in against the District.

The Court: I will overrule your objection at this point.

(Whereupon counsel resumed their places at the table and the following proceedings were held:)

By Mr. Frosh:

Q. Officer Crist, would you tell us the number, the names and the locations of the other buildings, particularly
230 the public buildings that are located at or near the intersection of Wisconsin Avenue and Albemarle Streets, Northwest? A. Right at the intersection, of course, we have a Public Library on the corner opposite Sears.

Q. Yes. A. And immediately back of that would be the Janney School.

Q. Is that a public school? A. A public school.

Q. What level is that? A. Elementary through the sixth grade.

Q. What other schools are there in the area? A. Adjacent to the library is the St. Anne's School, a parochial school, through the eighth grade.

Q. Are there any other schools in the immediate area? A. One block away, Tenley Circle, is Immaculata, which goes through second year college.

Q. Are there any other—are there any churches or other buildings of this sort in the neighborhood? A. St. Anne's, of course, have a church right one block away at Tenley Circle.

Q. And what other major stores, such as Sears, if any, are in the area? A. Well, of course, both sides of
231 the street there are stores continuously on both sides.

Q. Is there a Hechinger's Store, a lumber furniture store— A. About one block away, yes.

Q. That is across from Sears, is it not? A. Diagonally opposite from Sears.

Q. Now, these stores and these churches and these schools and the Public Library were all there in December of 1962, were they not? A. That is correct.

Q. Your duties as a traffic coordinator were the same duties that you had in 1962, are they not? A. That is correct.

Q. And in connection with these duties were and are you familiar with the number of people, the number of pedestrians who would be on the street in connection with any of these public or private institutions?

Mr. Cashman: Objection, Your Honor. What we are concerned with here is the traffic pattern that existed on the date in question.

Now, this officer's general familiarity with what pedestrian traffic uses that intersection I urge upon the Court has no relevancy in this particular matter.

The Court: What is the purpose of trying to show the number of people on the street? It would just be a guess anyway.

Mr. Frosh: Well, I can lay a foundation for that because I can ask him how many students are in the schools, if he knows.

My purpose is to show—

Mr. Cashman: Your Honor—before you say that, Mr. Frosh, I think Your Honor, that this argument might be better held without the presence of the jury.

The Court: Come to the Bench.

Mr. Cashman: Thank you.

(Whereupon counsel approached the Bench and the following proceedings were held:)

The Court: Why do you want to show the number of people on the streets? I don't think he would know. Why do you?

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The Court: He is not the land owner.

Mr. Frosh: Under the statute, he stands in the same shoes as the land owner.

The Court: You are talking about snow removal?

Mr. Frosh: Yes, Your Honor.

The Court: The Court of Appeals said that doesn't make him liable.

242 Mr. Frosh: They only said if they clean off a reasonable amount. It is a jury question as to whether it is a reasonable amount.

The Court: I think we have this witness and the jury here. Let him finish his testimony.

(Whereupon counsel resumed their places at the table and the following proceedings were held:)

By Mr. Frosh:

Q. Officer, I believe you were telling us the schools and the other buildings that were in the area and you mentioned a number of them that were there, and I asked you if these were the same buildings and schools that were located in this immediate area at or about the Christmas of 1962, and I want to ask you next, Officer, if you are familiar with the—and Your Honor, I am not sure as to your ruling on this—but I want to ask if you are familiar with the number of students who were in attendance or registered in these schools in 1962?

Mr. Cashman: Objection, Your Honor.

The Court: The objection is sustained.

By Mr. Frosh:

Q. I want to ask you, Officer, if you are also and have been familiar with the corner of Wisconsin and Albemarle from the standpoint of the pedestrian volume that
243 is and was on that street?

Mr. Cashman: Objection, Your Honor.

The Court: Well, I would like for you to clarify your question. Are you talking about being on Wisconsin Avenue where it intersects with Albemarle or what?

By Mr. Frosh:

Q. Well, let me ask it generally first, as background. Officer, can you tell us with reference to this corner whether it is a busy corner or a corner that does not have much pedestrian traffic, as compared with other areas in the District of Columbia?

Mr. Cashman: I have two objections to that question, Your Honor. One is on the ground that it is not relevant to the inquiry that we have in this case. Two, that it calls for a conclusion on the part or opinion on the part of the witness. After all, this police officer is just that. He is not a highway specialist or a traffic population control specialist. He merely is a police officer.

The question as phrased, Your Honor, I think is objectionable on those two grounds.

Mr. Frosh: He is a traffic coordinator, Your Honor.

The Court: I sustain the objection.

By Mr. Frosh:

244 Q. Now, Officer, do you know in the wintertime who cleans the ice and the snow from the sidewalks in front of and adjacent to the public schools in that area?

Mr. Cashman: Objection, Your Honor. This is not relevant at all, who cleans the sidewalks of snow and ice with respect to the schools.

This fall—on all the testimony that has come before this Court and this jury relates it to five or six strides away from Peoples Drug Store on the sidewalk where the path was cleaned off.

It seems to me to be wholly irrelevant as to what the public schools do with respect to the public space that surrounds their buildings.

The Court: The objection is sustained.

Mr. Frosh: Your Honor, may I state my position?

The Court: Not there, you may not.

Mr. Frosh: Pardon?

The Court: Not there. You may come to the Bench.

(Whereupon counsel approached the Bench and the following proceedings were held:)

The Court: You know, we will be here all spring if we have to take every section of Washington and go into snow removal and all of that.

Mr. Frosh: Your Honor, I recognize that that is
 245 an inherent danger in any of these cases, but I suggest to Your Honor that the thrust of the Smith case, as I understand it, is that first of all, we have to recognize that the District of Columbia is under a positive injunction laid upon it by the statutes to either clear the sidewalks themselves or at their own expense or clear them and bill the land owner or the occupant of the immediately abutting sidewalk.

The Court: I don't believe that the law has been tested yet. I don't think anybody has sued a private individual to collect it yet.

Mr. Frosh: That may be but that doesn't mean that in this case and at this time that there is a question before Your Honor as to whether that law is constitutional or not. It is on the books. It has been on the books for thirty years.

Mr. Cashman: The Court of Appeals—I don't mean to interrupt—the Court of Appeals in the Estelle Smith case itself said that this statute did not change the common law obligation that the District of Columbia had with respect to—

The Court: It said that it didn't put it over on the owner?

Mr. Cashman: That's right.

Mr. Frosh: I agree that there are limitations in the case,
 246 but I don't think that the case says that the District, despite a statute on its books, has no responsibility for snow removal.

The Court: It doesn't say that at all. I expect to tell the jury that they do have the responsibility, but they have this responsibility and it has to be considered with regard to conditions.

Mr. Frosh: What are the conditions?

The Court: Well, they have to have notice, as you know, and they are not supposed to go around just as it snows and right after it snows, go clean up everything, because they can't.

But if they do have notice and they do have an opportunity to do it, they are supposed to do it.

Mr. Frosh: And what constitutes notice if not heavy traffic use?

The Court: Notice is if the condition has been there long enough where, if they were exercising due care, they would have known of it. Actual notice.

Mr. Frosh: We aren't going to say that there is actual notice, but constructive notice because four days from the last snow storm—they know that generally throughout the city that there has been a snow storm and there are icy conditions, but what notice do they have of this area

except that it is extremely busy, one of the areas
247 where we say the jury has a right to say they were
guilty. How do I get that before the jury, that there
is large vehicular traffic?

The Court: If he knows anything about the conditions that were there, he can testify about them, but I mean conditions as far as the street was concerned or anything like that where they had humps or ridges or hummocks.

Mr. Cashman: He doesn't know.

Mr. Frosh: He didn't know about this occurrence. All he knows is that this is a very busy pedestrian corner.

The Court: I think if that is the point that you are trying to make, you can make it by other means than asking this officer's opinion as to whether or not it is a busy intersection.

Mr. Cashman: You can argue to the jury if you think it is such a busy intersection—that from these facts it is a busy intersection. I am not saying that it is terribly relevant.

The Court: I wonder if you couldn't stipulate that this is a busy intersection.

Mr. Cashman: Absolutely not because I don't know—agree with their theory about the busyness of the intersection showing there is an obligation on the District of Columbia.

The Court: I think that it is a busy intersection as far as Wisconsin Avenue is concerned, but I don't think
248 that Albemarle is very busy until you get into Nebraska Avenue and in that area it is.

Mr. Frosh: I go down that way every morning and I come down River Road straight down to the block before Sears, make a right turn, go around Number Eight and come down Albemarle Street because that is the fastest way to get to Reno.

The Court: I live on Albemarle.

Mr. Frosh: I have to wait for ten minutes for a through traffic light. I know it is busy. I want him to say that.

Mr. O'Donnell: Do they clean the streets for you where you live on Albemarle Street?

The Court: No. No, they certainly don't and I live at Albemarle and Connecticut. It is forever getting cleaned.

Mr. Frosh: Where do we go from there? May I ask him simply the number of students that attend these schools?

The Court: We have already passed that. You are going backward.

Mr. Frosh: Maybe I am asking a re-thinking of that, but I think it doesn't harm the record in the slightest.

The Court: What do you want to ask him? How many people are up there at the Wisconsin intersection?

Mr. Frosh: How many students attend each of
 249 these schools. I want to ask him who cleans the
 sidewalks in front of the public buildings. Period.
 That is all.

Mr. Cashman: Absolutely not relevant, Your Honor.

The Court: I don't believe it is either.

Mr. Frosh: Why does the District of Columbia clean
 sidewalks in front of the schools?

The Court: I don't even know that it does. It may be
 the schools.

Mr. Frosh: But they are the District of Columbia. Why
 do they do it? Because they want their children and
 pedestrians to be safe.

Where do they draw the line? Just exactly in front of
 the school? Does that help? Kids don't just suddenly
 come to the front, they come from somewhere and here is
 a corner they have got to cross. A policeman is stationed
 there.

The Court: When does this officer have his day off?

Mr. Cashman: No problem with this officer, Your Honor.
 This officer is assigned to day work everyday in the week.
 He does not have a rotating schedule.

The Court: He can come back?

Mr. Cashman: He can come back tomorrow. There is
 no problem. All I am saying is that Mr. Fosh's argument
 seems to be if we clean in front of the District
 250 building we should be able to clean by Peoples Drug
 Store. If we clean in front of schools in order to
 accommodate the safety of the children we should clean
 by Peoples Drugs. If we clean in front of the U. S. Dis-
 trict Court we should, therefore, be cleaning side streets.
 I don't think there is a rational basis for this.

Mr. Frosh: I am not saying that. I am saying that if
 you clean the sidewalks in front of the steps in the Dis-
 trict, people don't suddenly get plopped there, so therefore
 you clean all the way up to the corner and clean both sides
 of the corner, so access to the District building is a reason-

able access. When you are cleaning in front of the stores so the pedestrians can have access to the stores, you have to make reasonable access to it.

The Court: I am going to let the jury go now and the witness can come back in the morning.

In the meantime I want to have a citation from the very best case that you can rely upon for holding in the store.

Mr. Frosh: I have five of them right here. May I get them?

The Court: Yes.

(Mr. Frosh handed paper to the Court.)

The Court: What repairs are you talking about?

Mr. Frosh: This is not limited solely to repairs, 251 just citing the general law. The repairs include keeping the sidewalks in good order. They undertook to clean this little corner right here. They undertook to clean that and I am assuming for the moment that most of that corner is public space, most of it. None of this. They undertook to clean this to make the area reasonably safe to pedestrians.

Having undertaken this they let their pedestrians into the store, come out of the store, assume the sidewalks are cleaned and they are not cleaned. And undertaking what may have been a gratuitous duty, that they didn't owe, leaves them liable, if they didn't do a reasonably good job.

The Court: You don't have a District case?

Mr. Frosh: No. The Maryland one is the closer to the District of Columbia. There is a Maryland case that is fairly recent.

Let me also cite the case that Judge Holtzoff decided some weeks ago.

The Court: I have a copy of that.

Mr. Frosh: It is very relevant.

The Court: Judge Holtzoff's case wasn't anything like that. Judge Holtzoff's case was one where there was an

area where a party who was staying at an apartment house or motel—he said that it was so close together that the border line between the public street and the area that belonged to the hotel was so close that you couldn't tell, you see, which it was. So he said that under those conditions they had to get into this place and he kind of based it upon that.

But that is not like this. Nobody thinks that way that down there almost to the back of this store is anywhere near the entrance to this store.

Mr. Frosh: Well, there is only one entrance to that store. You can't get to that store unless you come up Wisconsin or up Albemarle because you certainly can't get out on the corner.

The Court: I know, but they don't have to. That is the business of the District to keep the streets. It is not theirs.

Mr. Frosh: I don't know how you get around the statute.

The Court: Well, they have been doing it right along.

Mr. Frosh: That hasn't been enforced.

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PROCEEDINGS

(The following proceedings were had out of the presence of the jury.)

The Court: Good morning.

Officer, would you go out for just a few minutes? You can go out this door.

(The witness left the courtroom.)

The Court: I think it would be a good idea if you would indicate what it is that you expect to show by this witness that you called.

Mr. Frosh: Yes, Your Honor. I don't know that I completely understood the Court's injunction to me last night about preparing the case or cases upon which the plaintiffs rely insofar as the admissibility of Officer Crist's testimony and later testimony.

The Court: Well, that wasn't the point. The point about the cases was the situation with respect to the Peoples Drug Store.

Now, in that one case which involved a pedestrian, you know, in 1948, the Court of Appeals held that these provisions in the District of Columbia Code did not mean that a property owner was liable to a pedestrian who was injured by snow being in front of the property owner's property.

257 Now, we have here, according to the testimony of

Mr. Krill, he would be considered an invitee, but usually the obligation of the store owner to an invitee is with respect to his premises and the means of exit and entrance, so that is what creates the problem.

Now, this plaintiff said he was on the sidewalk and he was not in the store at the time and he was not at the exit or entrance of this establishment, and that is what I wanted help on. You vaguely referred at times to something about this downspout and you also have, I would say in sort of a vague way, indicated that you thought that there was maybe a sort of no man's land like there was in that case, I think it was the Altemus case, where the tenant or land owner was using a part of his premises as a part of a sidewalk, in which case the Court held that the owner of the ground as well as the District would be responsible because the defective area was partly on the street and partly on the property of the landowner.

Mr. Frosh: All right. Well, I will try and address myself to that. I believe that the cases on which the plaintiffs will primarily rely are, first of all, the Smith v. District of Columbia which is 89 U.S. Appeals D.C. 7 and the federal citation—

258 The Court: Now, I am very familiar with the Smith case, but I don't see how that helps you at all with respect to the Peoples Drug Store.

Mr. Frosh: All right.

The Court: Because it doesn't mention a person who stands in the position of an invitee at all, that was just a case between the District of Columbia and the person who fell.

Mr. Frosh: Well, I believe it does and what I would like to do is read to the Court the portions of this case that I think clearly indicate what the law is in the District of Columbia, both insofar as Peoples Drug Store is concerned and insofar as the District of Columbia government, because I think the case treats with both of them and tells us what the law is.

The Court: Well, all it does in that case by treating with somebody who wasn't the District was that it said that the landowner had cleared a part of the sidewalk.

Mr. Frosh: Well, it tells us what the law is and I am reading the headnote portion referred to as headnotes 4 and 5 and it appears on page 9 in the U. S. Appeals D. C. citation:

This Court—and this is the Court of Appeals speaking—this Court in *Hecht Company v. Hohensee* 259 pointed out that any duty which a property owner may have to remove snow and ice from the abutting sidewalk—and this is in the context of the Code provision—is fully served by the clearing of a reasonable portion of the sidewalk where the fall of the snow is such as to make it impractical to clear the entire sidewalk.

Now, this, the Court of Appeals in the *Smith* case says, is the duty of a landowner, the occupier of the premises.

The Court: The trouble is it doesn't say he has that duty, it says that any that he may have, and in this other case they said he didn't have any.

Mr. Frosh: Now, in the *Hecht Company* case, and that is the case where the Court of Appeals did to some extent talk about the obligation of the *Hecht Company*, it says:

In the instant case, there had been a very heavy snow-fall three or four days before the accident, followed by freezing and thawing weather. The sidewalk adjacent to

the defendant's building on F Street was twenty feet wide. Obviously, it would have been impractical for the defendant to attempt to clear more than a portion of the walk and that is what was done, presumably
 260 immediately following the snowfall. Something had to be done with the snow that was shoveled off. It could not be thrown in the street without impeding traffic but was deposited where it could do the least harm, namely, toward the curb. The thawing and freezing weather that followed and the use of the walk by the public were certain to make it icy and very rough.

And here they are talking not about the portion that was cleared, but about the portion of snow that had been deposited by the defendant Hecht Company on the sidewalk itself.

The Court: Now, apply that to your case; in what way does that relate to your case?

Mr. Frosh: All right. We say the statute very clearly places a duty upon the occupier of the land, not necessarily the owner of the building, the occupier of the land, the Peoples Drug Store themselves, the statute is clear that there is a duty to clean the sidewalk abutting their premises and there is no question but that the sidewalk on Albemarle Street and the sidewalk on Wisconsin Avenue, which we are not concerned with, that these sidewalks about their premises.

Now, they have this duty. There has been a continual
 261 debate by our Courts, by our citizenry, by everybody else, as to what the abutting property owner is supposed to do.

Now, I candidly agree, and we have a former Commissioner here in the courtroom who can tell us, that the District of Columbia government does not make an attempt to clean all of the sidewalks or all of the streets.

As Mr. Cashman would say, there is no duty to clean every inch of sidewalk and street in the District of Columbia. But, at the same time, there is a question as to

what the reasonable requirement and the reasonable obligation of a municipality is towards its citizenry when you have snow and ice accumulating on the streets and sidewalks.

The Court: I am not at all concerned about what the District's responsibility is, all I am interested in hearing about is what you have got to say about the Peoples Drug Store.

Mr. Frosh: I say that, under the statute, they clearly have the responsibility. I say that the Hecht Company case says that in that case that responsibility was discharged by cleaning a reasonable amount of the sidewalk; that in the Smith case the Court again says that any duty they have under the statute, and they recognize the statute says clean the sidewalk, they say this is discharged
262 by cleaning a reasonable amount of the sidewalk.

I say in this case that it is a jury question as to whether Peoples Drug Store cleaned a reasonable amount of the sidewalk abutting their premises, that is Point No. 1.

The Court: But you are not attempting to tie this in, in any way, to the exit or the entrance place. So what you are trying to do, by what you say, is to say well, we won't pay any attention at all to this decision that the Court of Appeals rendered saying, in the case of a pedestrian who fell in front of a landowner's premises, that he hadn't any liability to him; that by the statutes about snow removal, the District was trying to put off its obligation to keep the streets clear on the property owners.

Mr. Frosh: Your Honor, I am not familiar, very frankly, with any case that says that.

The Court: Oh, well, let me get it for you.

Mr. Frosh: If there is such language that says that property owner does not have such a duty, I am just not familiar with it.

The Court: It is called Rodensky or something of the sort. Do you have it there?

Mr. Cashman: Your Honor, I have a citation to it in the Estelle Smith case.

263 The Court: Give me the citation, I will get the book.

Mr. Cashman: Your Honor, Rodenski v. Ellis appears in S3 U.S. App. D.C. 172, or 167 Federal 2d 745.

The Court: Ask them to send me one of those books.

Mr. Frosh: Your Honor, I don't think we even need to be concerned with that at this juncture because there are two other points that keep the Peoples Drug Store in.

The Court: Frankly, I didn't anticipate that we would hold your witnesses up to discuss this point at this time. I thought that what we were going to discuss first this morning was what you were attempting to show by this policeman that you called.

Now, you were asking him yesterday about certain schools. Now, this accident here didn't happen in front of a school, so I don't see what there is that is pertinent about a school. Usually where you have a building like a public building, the Art Gallery over here or some other public building or a school, they usually have employees that work in there that have certain responsibilities about cleaning the approaches and all that sort of thing, so I don't see how there is any comparison between Albemarle Street and what they have done in connection with the school.

264 Mr. Frosh: Well, I suggest that it has to do with the question of notice, because we have a burden to show that the condition here is such as would give rise to notice to the District of Columbia of the necessity for the cleaning of the sidewalk. And I suggest that we can show this notice by a number of ways: We show it by the length of time that elapsed between the falling of snow and the accident; we show that a sufficient time elapsed so that the District of Columbia should have been aware.

The Court: Well, the notice that you have is not about the falling of the snow, but the notice must be in relation

to the condition of the street, that you claim existed at the time that Mr. Krill was injured.

Mr. Frosh: That is right.

The Court: Well, usually they go out when they have a snow and remove it from these places right away, they don't wait for it to get in humps.

Mr. Frosh: That is right. And what I am saying, so far as Officer Crist is concerned and our later witness, we expect to show that this particular area, by reason of its tremendous use by pedestrian and vehicular traffic, is the kind of corner where the District has very great notice of the need to clean it.

265 The Court: Well, I think you are entitled to show, of course, what amount of traffic they have in the area, but how do you expect to do it by this witness?

Mr. Frosh: By showing the number of children that customarily use these sidewalks. You see, I have here the traffic surveys for Albemarle and Wisconsin. I am going to show the quantity of vehicular traffic, I want to show the quantity of pedestrian traffic, compared between these different places, because I think this is part and parcel of the notice that I can show, and this is the reason I say that Officer Crist's testimony on how many students are in these schools, and so on, is totally admissible.

The Court: Going back to this Rodensky case that you said that you didn't know of any case where they had said that, first it begins by saying: This is a personal injury suit against the owner of an apartment house by a school boy who was hurt when he slipped and fell on an icy sidewalk in front of the building. And then after saying certain other things, they say: Not having the charge of or control over any of the public ways, the owner or occupant of real estate owes no duty to pedestrians to clear or to make safe for walking ice and snow which is naturally accumulated on the sidewalk in front of it unless a statute validly imposes that duty.

266 And then they go on and say: Next, does the snow removal law impose on property owners an obliga-

tion to pedestrians? We think not. This Court said in the Maguire case, 24 Appeals D.C. 22, this class of legislation is undoubtedly an attempt on the part of the municipality to shift to the shoulders of individual citizens the burden which it is primarily incumbent on itself to bear.

And then it goes on and says: We note also that Section 805 of Title 7 provides it shall be the duty of the District Commissioners to remove snow and ice from paved sidewalks when the owners of abutting property have failed to do so in response to the statutory admonition, in which event the District's Corporation Counsel is directed to sue the property owners for the expense of removal plus a penalty. Since the snow removal statute goes no further than we have indicated, manifestly it does not purport affirmatively to make a property owner liable to respond in damages to a pedestrian who is injured by falling on snow which the owner has not removed from the sidewalk. Enactments of this kind are generally regarded as legislative efforts to require abutting property owners to aid in the performance of a municipal duty. It is held by the

weight of authority that an individual does not have
 267 a cause of action against one who neglects to aid the municipality in meeting its obligation. Since it seems to us to be based on sound principles, we adopt that holding.

Mr. Frosh: And they are talking solely about snow.

The Court: Yes, they are talking—well, they are talking about snow, of course the rule is the same, they go on either in this case or some other case to say, in another case, in 100 Appeals D. C., they go on and say—maybe it is 100—they say it doesn't affect the liability of the District of Columbia one way or the other.

Mr. Frosh: Well, Your Honor, I think the Smith case, when it talks about the ice and snow, is clearly differentiated from this and I expect that we can go into that on the later motion. There are other grounds on which I expect that we will be able to hold Peoples Drug Store in

and, if you want me to, I can go into those at this point or later.

The Court: Well, what I had anticipated that we would take up this morning was what you expected to show by this witness and go on with that, but I do think this is a problem.

Mr. Frosh: We may have a problem there and I think that I can differentiate that and I assume there will be a motion on the part of Peoples to be relieved from
268 liability based upon this case and I think we can meet that then. So far as the officer is concerned, which I would assume from what you say is the thrust of my arguments now, I think on the question of notice that the great use of this corner, it is important that the jury have before it a concept of what this corner means from the standpoint of the vehicular and pedestrian traffic. When you say that I can prove vehicular traffic, I suggest to the Court that—

The Court: Well, I didn't mean that you couldn't prove other kinds of traffic. I think that you can indicate that it is a used area, and all that, and show that, I don't mean to say that you can't. But what you were trying to get into as I understood it yesterday was that you wanted to show what they had done at these schools about cleaning the snow off.

Now, following the Smith case—I had the Smith case on retrial, I didn't have it the first time, I didn't have the case that went to the Court of Appeals and was reversed, but I did have it when it came back down—and they say in that case that notice is not notice of the original snow at all, it is notice of the condition which the plaintiff claims existed when he fell, and they say that and say it
269 very clearly. So I don't think the fact that they raked the snow off of the school grounds over there or off the sidewalk in front of the school would prove any notice at all, unless you are prepared to show that, over there in the school, they had the humps and

ridges or hummocks, or whatever it is, that you are claiming were over there on Albemarle Street.

Mr. Frosh: Well, I will show that the various schools cleaned off their own sidewalks, the District of Columbia being the owner of the schools, that the District of Columbia undertook to clean off the library sidewalks and I think we raise thereby, by showing the kind of traffic, pedestrian traffic that comes by, we raise again the question as to whether there is a reasonable compliance with the duty of the District of Columbia when it only cleans off the sidewalks on the west side of Wisconsin Avenue and doesn't clean them off on the east side when there is the same pedestrian traffic on both sides. Where does the District of Columbia stop when they recognize that this is an important corner?

The Court: Well, I think you are arguing something else now.

Mr. Frosh: That is the reason I was going to ask about who cleans off the library and who cleans off the public school sidewalks, only for that reason, to show that
270 the District does this; where should they stop when the pedestrian traffic is on all four sidewalks? Where do they stop in making these sidewalks safe for this quantum of pedestrian traffic?

The Court: You are attempting to show that they cleared this off in that situation but without showing what the condition was when they cleared it off. As I understand your position, you don't intend to show that this was just the snow in its original state. I would gather from what you say that you aren't taking into account the fact that what you have to show is notice of the state that the street was in at the time Mr. Krill fell, that is what the Court of Appeals said.

Mr. Frosh: We will show that, I think the time alone will show it, the time element alone will show that, but we show that also by their knowledge of the amount of pedestrian traffic that goes over this that normally would trample

snow into ice, ridges and hummocks because of the temperature variations which also they were aware of in a four-day period. But I suggest to Your Honor that the testimony will show that the schools and the libraries clean off the snow immediately after it falls, so they don't get the icy condition.

271 The Court: Well, the fact that they clean it off right after it happens, then, has nothing to do with this case because the Court of Appeals in Smith said very clearly and distinctly that the notice the District has to have is not of the original fall of ice and snow, it has to do with it being in the danger state which the plaintiff claims it was in when he fell.

Mr. Frosh: Perhaps the officer can tell us, as well, that the District of Columbia maintains these sidewalks and sees to it that they don't get ice on them, after having cleaned them the first time. And I suggest that in order to show this, we need to have the officer simply testify about the pedestrain traffic and who cleans the ice and snow from the schools and the libraries.

The Court: Mr. Cashman, do you want to say anything about who cleans the ice and snow?

Mr. Cashman: Yes, Your Honor, I would. Your Honor, as I understand the threat of the argument that is being made by plaintiff, it is that the District of Columbia should have cleared the sidewalk near Peoples Drug Store on account of the fact that the District of Columbia supposedly has facilities that regularly clean the sidewalk in front of those premises and, as an example, the plaintiff is
272 using a library and some schools.

Now, first of all, Your Honor, what we do with respect to the sidewalks adjacent to our schools and to our libraries, where we would maintain custodial personnel, wholly distinct from our general obligation to clear the roadways, apart from the fact, Your Honor, that if we cleared it in front of the library and in front of the school and we didn't clear it on a adjacent sidewalk where there

was either a commercial facility or residential homes, Your Honor, the fact that we would clean it next to our own facilities with our own indigenous local personnel there, would operate to our detriment and to our prejudice with respect to the place in question.

Now, the place in question, Your Honor, is clear, it is on Albemarle Street, somewhere on the sidewalk east of the corner of Wisconsin and Albemarle. Now, there is no District facility there; there is only our general obligation which is, as Your Honor has pointed out time and time again, clearly defined in the Estelle Smith case.

Your Honor's remarks with respect to notice are, I think, particularly significant. Now, Mr. Frosh, for the plaintiff, says that the traffic of individuals goes to prove our notice.

Now, that is not immediately apparent to me how
273 he can do that.

The Court: I didn't think he said that.

Mr. Cashman: Excuse me, if I misstated his position, Your Honor, I would like to have it clarified.

The Court: I thought he was stating that large numbers of people used this area and, of course, I don't know exactly what conclusion he is going to draw from that, I guess if it is very icy, they would maybe make tracks. But at the same time, when a large number of people use on area, it tends to disperse the snow.

Mr. Cashman: Yes, Your Honor, it does, that is very true. But if I understand the thrust of Mr. Frosh's argument, it is this, that on account of the traffic, both pedestrian and vehicular, that occurred at this particular intersection, that the District of Columbia should have singled this intersection out as one that on account of its unusual traffic load should be cleaned in the highest priority of intersections that are cleaned.

Now, that is my deduction from what proof and what evidence Mr. Frosh intends to put on by virtue of the police officer and the traffic count.

And as I said to Your Honor yesterday, if that is the direction of his argument, it really brings us into an area of governmental function where the District of Columbia in the exercise of a quasi-judicial function has the discretion to say we will clean 14th and F Street before we will clean 14th and Pennsylvania Avenue, or we will clean 15th and Executive Drive before we will clean Connecticut and K—Your Honor, that kind of decision, whether right or wrong, is merely an exercise of our discretion for which, even if we were negligent in making it, we would not be liable.

I would cite Your Honor the Urow case, and I don't have the citation.

The Court: What is the name?

Mr. Cashman: It is U-r-o-w v. the District of Columbia, where we were sued on account of the fact that a pedestrian was seriously injured or killed, up by the Zoo, up by Cathedral Avenue. Between Cathedral Avenue and Devonshire Place, we did not have a traffic light. The argument of the plaintiff was because of the heavy traffic up there, because the Zoo is used so frequently, we ought to have placed a traffic light there. Our failure to do so was negligence.

The Court of Appeals held clearly that this was a judicial function on the part of the administration of the municipality, that it was within our proper discretion whether to put one up there or not, and even if we were wrong in making the judgment, we would not be liable in damages because it was purely a governmental function.

The thrust of Mr. Frosh's argument is the same way, I believe, Your Honor, and frankly, I might say two further things, I cannot see any notice to the District of Columbia of the condition alleged to have been the one that caused Mr. Krill to fall, any connection between—

The Court: Now, the thing about it is Mr. Frosh hasn't finished his case yet.

Mr. Cashman: Oh, I am aware of that, Your Honor.

The Court: He may have weather reports and various things which will show how long it has been snowing, and I don't know what else he might show. But going back now to this condition that you are talking about of whether there is traffic and so on, you know in this case of Campbell, Campbell was the case where I think the Judge gave a directed verdict, I believe, and it was reversed by the Court of Appeals and they said something in their opinion that, based on the amount of traffic in the area, the area should have been in pretty good condition; I think that was testified to by somebody in connection with the District government.

Mr. Cashman: Your Honor, that may be so, the
276 particular allusion to that, however, Your Honor, I don't have with me. But I think there is something very important about the Campbell case that is quite distinct from what we have here. If I am not mistaken, the plaintiff in that case fell adjacent to the courthouse, is that not a fact?

The Court: Yes, she did.

Mr. Cashman: Now, Your Honor, that would be a situation that would be similar to falling next to the library, falling next to a school, where we do have custodial personnel, quite distinct from our general obligation to keep the roadways and the sidewalks in a reasonably safe condition. So the traffic in that case, I think, would have a bearing on our liability since it was a District of Columbia facility.

However, that is not the case here. We merely have our general obligation to keep the sidewalks in a reasonably safe condition under all the circumstances. So I would make the distinction on that ground, Your Honor.

The Court: Well, I would think that one of the circumstances would be what traffic he had there. For instance, when you clean the area down here in the main part of the City, you take the traffic, both the pedestrian traffic and other traffic into consideration, I would think.

Mr. Cashman: Yes, Your Honor, that is correct. I
 277 am not saying that we don't take the traffic into consideration.

The Court: You are trying to say that your discretion—

Mr. Cashman: What intersections we clean first, Your Honor, is a matter of our municipal discretion; it is a governmental function for which we are not liable. However, to put this proof in front of a jury with respect to whether or not we should clean Albemarle and Wisconsin before Connecticut and K Street, I think, Your Honor, is highly prejudicial to the District of Columbia.

The Court: Well, I don't think he is going to do it in that sense.

Mr. Cashman: Well, I just wanted to make my position clear, Your Honor, so that when the officer came back, I wouldn't be jumping up and objecting to your surprise, because I do not believe that—

The Court: What are you saying, are you saying that you don't believe there should be any evidence of what the traffic conditions are in the area?

Mr. Cashman: Your Honor—

The Court: Either pedestrian or vehicular?

Mr. Cashman: Your Honor, I say this, that with respect to the knowledge that this police officer has, regarding whether or not we clean in front of District facilities, that is, the library and the schools—
 278

The Court: Now, I agree with you about that.

Mr. Cashman: All right—has no relevancy, that is my first point.

Now, another projected piece of evidence to come out from this officer is how many school children attend the schools? Now, I don't think that is relevant, but even if it were relevant, Your Honor, this is December 24th, the snowfall was on December 21st. Your Honor, if I am not mistaken, there is no school during that period of time. So this officer's general recollection about what the normal school population was, would have especially no relevance

in this case since the children weren't going to school at the time.

The Court: I thought they usually got out about the 23d of December.

Mr. Cashman: That is probably correct, Your Honor, and this accident happened on the 24th.

The Court: You are not questioning the testimony about the traffic generally, are you, both pedestrian and vehicular?

Mr. Cashman: Well, Your Honor, I just expressed an objection as to why I don't think the pedestrian traffic that would be normally due to the school children should be a part of this case.

The Court: Well, I am not talking about school children.

Mr. Cashman: Well, I thought Mr. Frosh was.

The Court: Let's leave the school children out and just talk about people in general as pedestrians and vehicular traffic. My recollection is that the Smith case says something about the District considering one place as against another.

Mr. Cashman: It does have language, Your Honor, to that effect, it talks about conditions existing generally prevalent throughout the City, I believe that is more or less the language that they use and, therefore, you would get into a situation of say comparison, but it is not a traffic comparison, Your Honor; nowhere in the Estelle Smith case do I see a traffic comparison.

And one further comment, if I may, Your Honor. This police officer is talking out of his general experience, he is not talking out of records that he has, there is no foundation for him to say—

The Court: He is not a traffic expert?

Mr. Cashman: I hardly think so, Your Honor, I hardly think so. He has not been proffered as such.

The Court: Would you go in there and ask them to send me the Smith case?

Mr. Frosh: I have it here.

Mr. Cashman: Your Honor, I have the Smith case.

The Court: I wanted to see about this part that I was talking about, Mr. Cashman.

Mr. Cashman: Yes, Your Honor.

(The book was handed to the Court.)

Mr. Cashman: Could I be of some aid to the Court, Your Honor?

The Court: Yes.

Mr. Cashman: In Headnote No. 15, there is language to that effect, I believe. It is in the latter part of the first paragraph, Your Honor.

The Court: You say the latter part of the first paragraph? I thought you were referring to the Headnote 15.

Mr. Cashman: Oh, I am sorry, I meant Paragraph Numbered 15, Your Honor, in the body of the case itself.

The Court: Well, I don't see exactly the clause that I had in mind and there are so many, so I will hand it back. I will find it later.

Do you want to call your witness now and go forward with him?

Mr. Frosh: Yes, I do.

The Court: But I don't expect to permit him to take the schoolhouses and the library and talk about the custodial force getting out and cleaning the snow off, because I don't think that has anything to do with what is involved here. What we have here is a condition that Mr. Krill complained of, and the juries in these snow cases are told that it doesn't apply just to ordinary ice and snow, you know, that has just come down.

Mr. Frosh: I understand Your Honor's ruling and I must abide by it. Am I to be allowed to have him testify as to the quantum of pedestrian traffic, subject to the continuing objection, I guess, by Mr. Cashman? I just don't know.

The Court: Not to single out pupils as school pupils, but just to pedestrians.

Mr. Frosh: Well, I am going to ask him how many school children are there and I suggest to the Court that school does get out on the 23d and the records later will show—

The Court: Well, I don't think that you are entitled to single the school children out.

Mr. Frosh: No, I am just going to have him tell
282 how many school children there are in this area, because this is a contributing factor to the quantum of pedestrian traffic.

The Court: Well, I think his testimony ought to be with respect to pedestrians, and then if you want to ask him what percentage of children, I don't know whether he'd know or not, and what percentage of adults, that is one thing.

Mr. Frosh: No, he won't. He happens to be, I understand, the traffic coordinator for the schools in that area and, as part of his duties, works with the schools to help them in the pedestrian traffic and vehicular traffic at this intersection. So from this point of view, if further qualification is necessary, I will ask him what his precise duties are and how they are involved so far as the schools are concerned.

Just so the record is clear on it, I fail to understand the distinction Mr. Cashman is drawing between the District's general duties as a municipality and its specific duties as a custodian of the schools and the library, because if there is a distinction between the District's duty to clear the sidewalks, between its general duty and its duty as the owner of the library and the schools, then we get into the same obligation.

The Court: Now, I don't have any difficulty about
283 that. It seems to me entirely reasonable, if you have a building like a school or a library and you have a force of people who take care of it like a janitor or sweepers or cleaners or whatnot, that when a snow comes on that they would get out and do whatever was required. But

certainly we are not going to have a janitor for every street in Washington to get out and clean the snow off that street.

Mr. Frosh: No, that isn't my point. My point is if the District has that duty because they have a building in a particular place, they don't have that duty because they are the government, they have it because they have a building there and they are abutting on a public walk, the same as Peoples, that is my only point. I just don't see the difference between the District as the owner of a school, and Peoples.

The Court: Well, the difference, if you would read this case and study this case of Rodensky, I think you would see the difference because they say there that this snow statute doesn't make any difference in what the liability of the District was, that it is the same as it has always been and recognized way back there in some early cases. They say they had this responsibility and by this snow law they are trying to put it off on somebody else, that is what they say, and they say that they are going to hold them
284 to it, to the responsibility that they had and they say they are not putting it off on the property owners.

Mr. Frosh: All right, I expect to be able to meet that when we get to the directed verdict.

The Court: All right.

Will you bring the jury in.

(The jury resumed their places in the jury box.)

The Court: Good morning, Members of the Jury.
You may proceed.

Ray L. Crist

resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Frosh:

Q. Officer Crist, yesterday afternoon I believe you had told the ladies and gentlemen of the jury of the area at Wisconsin Avenue and Albemarle Street and you told us something about your duties at Precinct No. 8.

I want to ask you if you will tell us what your duties specifically were as a police officer attached to No. 8 Precinct in December of 1962 and what your duties are at the present time? A. They are the same as they were then.

Q. Would you tell us what they were? A. Well, my primary duty is to organize the safety patrols and to supervise those in the schools and on their corners.

Q. And in connection with doing this, do you have any familiarity with or do you work with the problem of the children getting to their various schools? A. I do.

Q. And in order to do this, are you and were you familiar with the names, the locations and the numbers of students in each of the schools in the area immediately surrounding Wisconsin Avenue and Albemarle Street?

Mr. Cashman: Your Honor, would that question be repeated, please, I didn't hear it.

The Court: All right. Would you read it, please.

(The question was read by the reporter.)

Mr. Cashman: Your Honor, I have an objection to that on the grounds previously stated.

The Court: Yes, the objection is sustained.

Mr. Frosh: Your Honor, I thought I was to be permitted to go into this question of the numbers of students that were there and the pedestrians.

286 The Court: The number of pedestrians in the area, which would of course include the children.

By Mr. Frosh:

Q. Officer Crist, can you give us, with a reasonable degree of certainty, the number of pedestrians who would be traveling on the sidewalks including school children, of course, at the intersection of Wisconsin Avenue and Albemarle Street in northwest Washington? A. You mean, for instance, when we would have our—we have a school crossing there—

The Court: Would you keep your voice up a little bit, please, so we can all hear you.

The Witness: I will try to. We have a school crossing at this location, which is Wisconsin and Albemarle. Now, do you mean while we are on our crossing, the number of people that would cross there?

By Mr. Frosh:

Q. If you know, yes. A. I can approximate.

Mr. Cashman: Your Honor, I need some clarification. I don't know whether this police officer is talking about school children now or pedestrians.

The Court: He is talking about pedestrians—are
287 you not?

The Witness: That is what I was going to attempt to answer.

The Court: That is what he was asked about.

Mr. Cashman: Thank you, Your Honor.

The Witness: I could only, of course, approximate. It would be several hundred while we are there, I am sure, on our crossing.

By Mr. Frosh:

Q. And what time or times of the day does this pedestrian traffic continue on Wisconsin and Albemarle Streets?

A. Well, of course, there is always pedestrian traffic there.

Q. What are the peak hours? A. Well, I would guess early—

Mr. Cashman: Objection, Your Honor, I don't want this officer guessing about anything.

The Witness: I would estimate, if that is better.

The Court: Well, if you think that you could estimate fairly correctly, why, you may.

The Witness: Well, it is hard to answer, of course, but our peak that I am interested in, naturally, is between 8:30 and 9 o'clock in the morning, particularly.

288 By Mr. Frosh:

Q. And how many pedestrians are there that use this corner between 8:30 and 9 in the morning? A. Close to several hundred.

Q. What other peak hours are there? A. Well, there is another peak hour at noon.

Mr. Cashman: Your Honor please—pardon me, counsel, I don't mean to interrupt you but I am confused. Would Your Honor determine, for the sake of clarification, are we talking about school children now or—

The Court: No, we are talking about pedestrians.

Mr. Cashman: We are talking about pedestrians in general?

The Court: Pedestrians could include school children, but it is everybody.

Mr. Cashman: I see. Thank you, Your Honor.

By Mr. Frosh:

Q. Would you go ahead. A. Well, again, of course, it is natural at the lunch period which would be in the vicinity of 12 to 1, and then of course there is another peak period for us from a quarter of three to 3:30.

Q. Thank you, Officer. Now, are you, yourself, 289 familiar with the area immediately around the Peoples Drug Store on Wisconsin and Albemarle Street? A. Reasonably so, yes.

Q. And were you familiar with that area in December of 1962? A. Yes.

Q. And Officer, can you tell us whether you have had occasion, on one occasion or more than one occasion, to observe and be able to see the Peoples Drug Store building?

A. Well, yes.

Q. There came a time after 1962 when that building was remodeled, did there not? A. Correct.

Q. Can you tell us, Officer, how long the building—what the distance was that that building occupied on Albemarle Street, what the length of that building was on Albemarle Street prior to December of 1962? A. You mean to estimate the length?

Q. The length of the building? A. Of course, it is increased now, I would just judge it to have been somewhere around 30 feet.

Q. What would you estimate to be the length of the building now? A. Considerably more, I would guess on 290 Wisconsin Avenue, I would estimate on Wisconsin Avenue that it would be 40 to 50 feet; on Albemarle, from 60 to 70 feet.

Q. What was the distance or the length of the building on Albemarle Street prior to 1962? A. Approximately, I would estimate 40 feet.

Q. Thank you, Officer. And you have had occasion many times to see this building, have you not? A. Yes, sir.

Q. You are intimately familiar with this neighborhood? A. I go by it continually.

The Court: Awhile ago you mentioned some length as being 30 feet, what length was that?

The Witness: I was referring to the Wisconsin Avenue side, it is a little bit longer, I think, on Albemarle than it is on Wisconsin.

The Court: This was before?

The Witness: Yes, before the remodeling.

The Court: Thank you.

By Mr. Frosh:

Q. You have been in this area for approximately what, 25 years? A. Yes.

291 Q. Now, have you had occasion to observe any distinctions between the pedestrian traffic on any particular corner, for example, the northeast, the northwest, the southeast or the southwest corner, or is that pedestrian traffic on all four corners? A. It is on all four. I would estimate the south crosswalk would be the heaviest traveled.

The Court: And when you say the south crosswalk, you mean—

The Witness: Across Wisconsin Avenue, from Peoples Drug Store over to the library.

The Court: That would be across Wisconsin?

The Witness: Across Wisconsin, Your Honor.

By Mr. Frosh:

Q. And that would be the heaviest of the crosswalks?

A. I would estimate it to be.

Mr. Frosh: We have no further questions.

Cross-Examination

By Mr. Cashman:

Q. Officer Crist, with respect to the numbers that you have given in terms of describing pedestrians who used that intersection, is it part of your job to take a traffic count, do you take an actual count? A. Occasionally,
292 yes, with the school children only.

Q. That is right, with the school children only. Now, with respect to the pedestrians in general, you don't take a count, isn't that right? A. When I check, I do not.

Q. So your figures are merely estimations out of your experience? A. Correct.

Q. You don't have any records or anything with you, do you, to support these figures? A. I do not.

Q. Now, you were asked about a change in the Peoples Drug Store. Now, when did that change occur? A. Just recently, I believe they have just completed it this school year.

Q. I see, so it would have been within the last year? A. Yes.

Q. Now, you said that the building was enlarged? A. Was enlarged, yes, correct.

Q. Now, Officer Crist, let me ask you this, is it your testimony that back in 1962, roughly December, that the frontage of the building known as the Peoples Drug Store on Albemarle Street was 30 feet? A. On Albe-
293 marle?

Q. Yes. A. I think I said 40.

Q. You said 40? A. Yes.

Q. Then if this were Wisconsin, so we won't be confused, and this were Albemarle— A. Correct.

Q. —and this is the southeast corner and this is the building known as the Peoples Drug Store and this is the frontage of the building on Albemarle Street, you would say that it is 40 feet? A. It was at that time.

Q. It was at that time, prior to the change last year? A. Prior to the change, yes.

Q. But on December 24, 1962, this distance would have been 40 feet, is that your testimony? A. Well, yes, about.

Q. And you have never measured that distance, have you, Officer? A. I thought I did.

Q. You thought you did. Did you pace it off? A. I did not.

294 Q. Now, you indicated that the frontage on Wisconsin Avenue was how long? A. 30 feet, it is less.

Q. It is less, 30 feet. Now, Officer, with respect to December 24, 1962, do you know whether or not school was in session at that time? A. On the 24th?

Q. The 24th of December 1962. A. Well, I am sure that it wouldn't be because it would be out before Christmas.

Q. The school children are out before Christmas. And in the schools that you have described, how long before Christmas do the children get out? A. Usually the day before, the public schools usually are always a day before

and the parochials may give them one extra day, sometimes they do.

Q. So it would be the 23d or 24th of December? A. Yes.

Q. Let me ask you this, Officer Crist, are you familiar at all with the circumstances that surrounded an injury to Mr. Jackson Krill, who is the plaintiff here? A. No, I am not.

295 Q. Do you know Mr. Krill? A. I know him to speak to, yes, I know who he is.

Q. And do you know Mrs. Krill? A. I do.

Q. Prior to the time that you received a subpoena to testify in this case, did you know that Mr. Krill was injured from a fall on snow and ice on December 24, 1962? A. I did not.

Q. You did not. Are you familiar with any of the conditions of snow and ice on Albemarle Street on December 24, 1962? A. I am not.

Q. At the intersection in question? A. No, sir.

Q. You have no knowledge at all on the subject? A. No, sir.

Mr. Cashman: Thank you.

Thank you, Your Honor.

Cross-Examination

By Mr. O'Donnell:

Q. Officer Crist, back in December of 1962, and I believe it is the same today, this whole area in here was paved, is that correct? A. Yes, sir.

296 Q. And was it paved in what we refer to as blocks?

A. The sidewalk area, right immediately next to the store?

Q. Yes. A. Yes, it is concrete blocks.

The Court: Now, Mr. O'Donnell, is your question directed to the present time?

Mr. O'Donnell: No, back in December of 1962, but I understand the situation is the same today.

The Witness: Yes, it is the same as far as I know.

By Mr. O'Donnell:

Q. And the blocks are divided by the cement poured, isn't that right, the cement is placed in this area? A. Yes.

Q. So this entire area here was cement except for tree box space? A. Correct.

Q. And isn't it fair to say that at that time, December of 1962, that there was an area going down Albemarle Street that was paved back to here where there was a grassy and dirt area extending to the end of the building, isn't that correct? A. I believe that is correct, yes.

297 Q. Now, do you know how wide one of these street blocks is? A. I would estimate about three feet.

Q. About three feet. A. The cement squares?

Q. Yes, the squares in the sidewalk, about three feet? A. About, maybe a little less.

Q. Now, approximately how wide is the tree box space?

A. At this location I couldn't say.

Q. Well, I thought you said you were very familiar with this area? A. Well, I could estimate, I would say three feet or possibly four, not more than that.

Q. Say four feet then, and then there would be two more blocks, that is the normal width of a sidewalk, isn't that correct, around six feet, two blocks in width? A. I think in this area it is much deeper.

Q. Well, could you tell us approximately how many blocks there are, three feet blocks, between this area that I am pointing to here and the front door, would it be fair to say that there are about eight blocks? A. I was going to say seven.

Q. So then it would be around 21 feet, from your
298 recollection, is that correct? A. Correct.

Q. Now, approximately how many blocks would there be from this door, you know that door was cater-corner—can you see this all right? A. Yes, I can see it.

Q. How many blocks would there be, in December of 1962, from this area here back to this grass and dirt? A. I don't believe I could estimate that.

Q. Would around seven blocks be a fair— A. Twenty feet, possibly, yes.

Q. That would be about twenty feet, you say, and it would be 21 feet this way, right? Now, I think your testimony was that, to the end of the building in December of 1962, there was around 40 feet? A. Approximately, yes.

Q. Let me ask you this, is it fair to say then, from the— what do you call this area? A. Tree box space.

Q. From the tree box space to the door here, it is seven blocks, and down in this area are there two blocks? A. I believe it would be.

Q. So this would be around six feet and then two
299 blocks here, would it be fair to say there are five blocks in this area? A. Approximately, yes.

Q. All right, that would be approximately 15 feet, is that correct? Now, how many blocks are there from this point here down to the end of the building, or were there in December of 1962? A. I could only approximate, four or five, possibly.

Q. Four or five, okay. Now, that would be about 15 feet. Now, is it your testimony that this area here was only 15 feet long? A. I couldn't say for sure, I know there was a spot there and I know it wasn't paved, but—

Q. Well, was this spot wider than this spot? A. I couldn't say, I would think—

Q. You don't really know? A. I don't know, no.

Q. If I suggested to you that there are 25 blocks down this area— A. Could be, I don't know.

Q. Could be, thank you. And that would be 75 feet, wouldn't it, approximately? A. Yes.

300 Mr. O'Donnell: Thank you. I have nothing further.

Mr. Frosh: I have no further questions.

Mr. Cashman: Nothing further, Your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Frosh: May we have the representative of the District Highway.

Thereupon—

Arthur Boyce Chick

called as a witness by the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Frosh:

Q. Would you give us your full name, please? A. Arthur Boyce Chick.

Q. Mr. Chick, what is your employment, please? A. I am an engineer technician with the D. C. Highway Department.

Q. What is your title? A. Engineering Technician.

Q. How long have you been with the District of Columbia Highway Department? A. About 18 years.

301 Q. In what capacity? A. Well, various capacities, first as clerk, and, you know, I have been working my way up a little bit at a time.

Q. But always in this department and in connection with traffic or highways? A. It's various duties.

Q. You are an engineer? A. No, I am not.

Q. But your title is that? A. Technician.

Q. Now, you are here in response to a subpoena on Mr. Mitton, who is what in the District of Columbia? A. Well, I am not exactly sure, he is my supervisor.

Q. Do you know his title? A. He is an engineer with the Traffic Planning and Design section.

Q. And the subpoena that was given to Mr. Mitton requested that there be brought to court this morning certain traffic surveys, did it not? A. Yes, it did.

Q. And in response to that subpoena, have you brought those traffic counts and traffic surveys? A. Yes, I have.

302 Q. Would you tell the Court and the jury the traffic counts and surveys that you brought with

you this morning, giving us the street locations and the years of those surveys? A. I will just read them right down: Wisconsin and Albemarle.

Q. What year? A. 1961 and 1962.

10th and G, 1964.

11th and G in 1962 and 1964.

12th and G in 1963 and 1964.

13th and G in 1961, 1962, 1964 and 1965.

13th and K in 1962 and 1964.

And 14th and K, 1962.

Q. All right. Now, I want to call your attention—

Mr. Cashman: May we approach the bench, please, Your Honor?

The Court: Yes.

(At the bench:)

Mr. Cashman: If Your Honor pleases, what we are going to have here is what we discussed prior to the time you called the jury in, that is, we are going to have an assessment between different intersections for different years with respect to the amount of traffic that takes place on them. It is going to be the contention of the plaintiff, obviously, that we should attend Wisconsin and Albemarle with the same preference with which we attend, perhaps, 10th and G, 11th and G, 12th and G, 13th and G, and 14th and K.

If Your Honor pleases, this relates back to my earlier argument that our selection of what intersections we do, what priority we give roadways, what attention we give the whole of the downtown area, is purely a matter within our legitimate discretion and may not be exposed to the jury as a basis of liability. It is a governmental function clearly stated in the case I gave to you earlier, *Urow v. the District of Columbia*.

The Court: Is that a reported case?

Mr. Cashman: Yes, Your Honor, that came out in, I think, about 111, but I am actually guessing, and there the Court clearly held—

The Court: I don't remember the Urow case. What is it in? I will send for it.

Mr. Cashman: I am not sure, I think it is 111 App. D.C., Your Honor.

The Court: It is Urow v. D.C.?

Mr. Cashman: Yes, U-r-o-w v. the District. And there it was clearly held that despite the fact that there
304 could be a showing that there was much traffic at the location in question, which was the Washington Zoo, that our decision not to put a light up there could not be made a basis of liability against us because it was purely an administrative exercise of our executive discretion.

The Court: What do you expect to show by this, and how would it be fair to compare 1964 and 1965 with 1962?

Mr. Frosh: I made a note of the four locations they have in 1961 and 1962, I think these are all 1962 traffic surveys and I was going to direct attention to Albemarle, and 11th, 12th, 13th and 14th, which are the only ones that have 1962, these are the only ones I am interested in and I agree to that. With respect to the Urow case, it is not our intent to dispute—

The Court: What is your purpose?

Mr. Frosh: Solely the question of notice.

The Court: The question of notice?

Mr. Frosh: That is right, we want to show the quantum of traffic on Albemarle Street and Wisconsin Avenue, pedestrian and vehicular, which he has an actual count in 1962, to show how busy the street is.

The Court: I don't see how that would relate to notice, I don't see how you tie notice in with how much
305 traffic you have.

Mr. Frosh: We want to show, as he did with the officer, that this is a very busy intersection, he has the actual figures.

Now, so far as 11th and G, 13th and G, 14th and K, I am only bringing those in to emphasize the fact that Wisconsin and Albemarle traffic is comparable with the down-

town areas. As to the scheduling of when they bring in the snow cleaning equipment, I am not interested in contesting that they are not exercising their discretion properly. I only want to show this intersection is as busy as any of these and I suggest that these traffic counts show that it is, and it solely goes to the question of notice.

Mr. Cashman: If Your Honor please, first of all I don't see how the traffic count runs to the question of notice in this particular case.

The Court: Well, I don't, either. I don't follow that at all, how you expect to get notice out of the traffic, out of the number of people who travel there.

Mr. Frosh: We expect to show that there is a very busy intersection and show that by merely the fact that they have undertaken to—

The Court: The thing about showing this means
306 they are going to have more opportunity to have the ice and snow kicked out, it doesn't show that it is likely to be formed in ridges or unusual shapes.

Mr. Frosh: The jury can exercise their common sense and judgment, and when they know that snow falls and they know there is a large quantity of traffic, we know it is compressed into various shapes and forms.

(In open court:)

The Court: Members of the Jury, it is time for your recess. You may have a recess of five minutes.

(The jury left the courtroom.)

(At the bench:)

The Court: Here is this case.

Mr. Cashman: Yes, Your Honor, thank you. It is 114 U.S. App. D.C. 250:

The designation by Commissioners—I am reading from Headnote 1—of the District of Columbia of intersections for installations of traffic control signals is essentially legislative in character and is the result of the Commis-

sioners' exercise of discretion and judgment, and failure to establish a signal at an intersection was not such negligence as would make the District of Columbia liable for the death of a pedestrian who was killed by a motor vehicle while crossing the street.

In the body of the opinion, Your Honor, it says here:

To argue that failure to exercise a discretionary authority is negligence serves only to underscore the legislative character of the authority. Whatever defects there may be in the doctrine of municipal immunity from tort liability, the doctrine is sound in this context. The District of Columbia cannot be held liable where the alleged negligence involved would require a jury to examine the reasonableness of this sort of discretionary quasi-legislative determination made by the Commissioners pursuant to the authority vested in them by Congress.

The Court: Well, I think I will let this in about 1962, those couple of areas.

Mr. Cashman: May I say this on the record, are you referring to Wisconsin and Albemarle for 1962?

The Court: Yes.

Mr. Cashman: And any other intersections for 1962?

The Court: I don't think those intersections are comparable at all, and I don't know how you picked them out.

Mr. Frosh: They may not be.

Mr. Cashman: For that reason, Your Honor, they shouldn't come in, if they are not comparable.

The Court: I said that is the way it seems to me.

Mr. Cashman: Yes, Your Honor. I just would like to note my objection.

(A short recess was taken.)

(The witness Chick resumed the stand.)

By Mr. Frosh:

Q. You told us just prior to the midmorning recess the traffic surveys that you brought with you and I believe you

indicated that you have 1962 surveys for Albemarle and Wisconsin Avenue in the District of Columbia? A. Yes, I did.

Q. Now, would you tell us, Mr. Chick, using those traffic surveys, would you tell us first the technique of making these, how these surveys are conducted by the District of Columbia or by whom they are conducted and, if you know, the manner in which they are conducted? A. Well, usually two men are assigned to an intersection, one man will take maybe north and east and the other man will take south and west.

309 Q. What do they count? A. They count vehicular traffic and pedestrians, from 7 in the morning until 6 at night, excluding 1 to 2.

Q. Now, would you consult your survey for Albemarle and Wisconsin for the year 1962, and would you tell the Court and the jury what the traffic counts were at this intersection, both for vehicular and pedestrian traffic? A. Well, for Albemarle on the west side of the intersection was 3990 cars; for Albemarle on the east side of the intersection was 4289. Wisconsin on the north side was 20,165, on the south side was 19,366.

Now, pedestrians counted east of the traffic, pedestrians crossing Albemarle in both directions on the east side is 1061 pedestrians. Crossing on the west side of Wisconsin, this is north and south, crossing Albemarle is 997. Crossing Albemarle, east, is 1051, and crossing on the north side which would be in both directions was 703.

Q. And now, Mr. Chick, would you consult the traffic surveys for the year 1962 for 11th and G Streets, N. W., in the District of Columbia?

Mr. Cashman: Your Honor pleases, may I, so that the record will be clear, may I renew my continuing objection to these surveys on the ground that they are neither

310 relevant nor competent to the inquiry at hand.
Thank you, Your Honor.

The Court: Yes.

The Witness: You want the same thing?

By Mr. Frosh:

Q. Yes, the same information. A. On G Street on the west side was 5,000. G Street on the east side is 4783. 11th Street on the north side was 10,358. And 11th Street on the south side is 9661.

Now, pedestrians are taken with the same directions but also this is a scrambled crosswalk. Now, pedestrians on the west side of 11th Street crossing G is 3991. Pedestrians crossing G on the east side is 3227. Pedestrians crossing 11th Street on the south side is 6242. Pedestrians crossing on the north side is 5356.

Now, there's also scrambled crosswalks, do you want those?

Q. Do you have the figures on that? A. Pedestrians crossing from southwest corner to northeast corner is 1436. Pedestrians crossing from northeast corner to southwest corner is 2516. Pedestrians crossing from southeast corner to northwest corner is 2724. And pedestrians crossing from northwest corner to southeast corner is 3455.

Q. Now, would you give us the date or dates on 311 which the 1962 surveys for 11th and G were made?

A. This was taken May 24, 1962.

Q. And the date for the Albemarle and Wisconsin? A. This was taken January 4, 1962.

Mr. Frosh: Thank you, I have no further questions.

Mr. Cashman: I don't have any questions, Your Honor.

Mr. O'Donnell: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Frosh: I believe Mr. Krill was being cross-examined by the defendant.

Thereupon—

Jackson N. Krill

resumed the stand and testified further as follows:

Cross-Examination
(Resumed)

By Mr. O'Donnell:

Q. Did you have an opportunity last evening to check the mileage on your car's speedometer from your home to Sibley Hospital, the five miles you testified to yesterday?

A. Yes, I did.

Q. What was it? A. It was less than the five miles that I had estimated. I also checked some mileages you
312 gave, which were as wrong as my previous estimates.

Q. Now, Mr. Krill, what did your speedometer show from your house to the hospital? A. 2.3 miles, I believe, or 2.4.

Mr. O'Donnell: Thank you. Your Honor, I have no further questions.

Mr. Cashman: I have no further questions, Your Honor.

Redirect Examination

By Mr. Frosh:

Q. Mr. Krill, you testified that you checked some other mileages that Mr. O'Donnell had given you yesterday and you found that those were equally incorrect as your own estimates. Would you tell us what other mileages you did check?

Mr. O'Donnell: Your Honor, I am going to object to the tone of that question. There was one suggestion that I recall in connection with the distance between his home and Dr. Radice's office at Dupont Circle and I asked him what the distance was from his home to Dupont Circle and it was my recollection that he testified it was 8 miles and I said by the map, or I have forgotten exactly how I

framed it, but would it be closer to 5? I never characterized or ever made any representation to anyone what the distance was. And the second distance that we were discussing was a distance he measured out on the map and I said would it be fair to say from your home to Washington Clinic by this map is 2 miles and not the 4 miles that you testified to under oath? And I think this is an unfair characterization by Mr. Frosh.

Mr. Frosh: I apologize for any unfair characterization, Mr. O'Donnell, I was simply picking up from the testimony of Mr. Krill.

Mr. O'Donnell: I think it would be fair, then, to have Mr. Krill tell us, if he checked the distance from his home to the Washington Clinic, what the distance was actually by his car and what the distance was from his home to Dr. Radice's office. I have no objection to that. But the way this question was framed—

The Court: Well, he is going to reframe his question.

Mr. O'Donnell: Thank you.

By Mr. Frosh:

Q. Would you tell us what other distances you checked by your speedometer yesterday? A. Inasmuch as this had been brought into question, I did check the mileage from my home to Dupont Circle to Dr. Radice's office.
314 It is 6.4 miles. And I had previously estimated that it was about 8 miles.

Q. Now, Mr. Krill, there was some question raised during the course of your cross-examination about your leave records from the Treasury Department. Would you tell us, Mr. Krill, whether as an executive or in an executive capacity at the Department, you are required to keep accurate time of all of the moments you spent in the office or out of the office? A. No, I am not.

Q. Would you tell us why not? A. Because we work at all types of odd hours. I have accrued a great amount of time for which I am not compensated as overtime. I am

permitted to take this as compensatory time. It is not often, except when in such an instance as we are talking about, that I have occasion to even take the compensatory time.

I might make a comment that may be pertinent here. Today my record will not show that I am on leave, perhaps, because I was at the office an hour and a half this morning and I will be there until midnight after the court adjourns today. I have been at the office every day until 6:30 and will go when the Court is finished today.

315 Q. And Mr. Krill, in examining the total amount of leave that has been charged to this occurrence, did you have occasions to compare this with the amount of leave that you actually took during the period from 1962 to date? A. Yes. I lost leave during that period. In other words, I didn't keep an accurate day by day account of every hour that was put in. I estimated and on some occasions I had to have leave, of course, when I was in the hospital; but I mean those days in which I was working part-time was not—this wasn't accurately accounted for because of my position, I did much work that was not shown.

Q. As a matter of fact, however, the amount of leave with which you are charged in the leave cards that were produced yesterday showed that your testimony earlier as to the number of hours ascribable to this accident are less than the total number of hours of leave with which you are charged, is that not correct? A. That is correct.

Q. And would you tell us why that is? A. Because on some occasions I took vacation periods during this time that I did not charge to this. I tried to account for that leave that was related to my injury and not being at work at that time. I made an effort to take out the annual

316 leave, the vacation periods that had no application to this.

Q. So that you were in fact by these records charged with more leave time than you have testified to as being ascribable to this injury? A. Yes, sir.

Q. Now, there was some testimony the other day, Mr. Krill, about your having taken five or six steps or 30 or 40 feet down the southeast sidewalk after you left the Peoples Drug Store. I want to ask you, Mr. Krill, do you have any exact recollection or do you know exactly how far you had gone from the entrance of Peoples Drug Store down the southeast sidewalk of Albemarle?

Mr. O'Donnell: Objection, may we approach the bench?
The Court: Yes.

(At the bench:)

Mr. O'Donnell: Your Honor, my objection is, No. 1, it would appear to me at this time he is attempting to impeach his own witness. My cross-examination was with respect to the five or six strides, I repeated it a number of times, he told me in so many words. I think not only is this an attempt to impeach his own witness, and should be brought to the attention of the jury, but No. 2, 317 this is something we have gone over in detail. Now, he is going to allow this man to reconstruct the whole thing all over again and I don't think it is proper. It is way outside the scope, it was very direct on cross-examination and I don't think this question is proper at this time.

The Court: What is it that you are trying to get?

Mr. Frosh: Well, Your Honor, during the course of direct examination, when I asked Mr. Krill how far he had proceeded, he said 30 or 40 feet. During the course of cross-examination, he said five or six paces. I think we are entitled to show the jury by redirect examination that 30 or 40 feet, five or six paces which Mr. O'Donnell put in his mind and called his attention to—

The Court: I don't believe he used the expression paces.
Mr. Frosh: Strides.

The Court: I thought he said steps.

Mr. Frosh: Yes, yes. I want to show that Mr. Krill during the course of his testimony on the deposition also said it could have been seven, eight, nine strides, "I didn't count the strides."

The Court: My recollection is that the deposition says something about five to ten, am I wrong about that?

318 Mr. O'Donnell: The deposition, in three or four places, says five or six strides. In his direct testimony, he said five to ten strides here before the Court. But if you look at the deposition, there are at least three places where he says five or six strides into the icy area where he fell, and that is the reason I asked him the question and he repeated in his own words in cross-examination five or six strides.

The Court: He is not talking about the icy area, now, is he?

Mr. O'Donnell: That is correct.

Mr. Frosh: Yes, he is talking about the icy area and he mentioned in direction examination five to ten; in cross-examination, five to six; he also on direct said 30 to 40 feet.

Now, I think I am entitled to have him say that he didn't know exactly how many strides he took, this was an estimate, that he didn't know how many feet he went, and this is an estimate. And I think he is entitled also to say, because I guess it was Friday, Mr. O'Donnell showed or allowed me to show Mr. Krill a map to scale of this area which confirmed the distances that he is talking about, and

I think I am entitled to clear up where this took place.

319 The Court: I will overrule the objection.

(End of bench conference.)

By Mr. Frosh:

Q. Let me see if I can recall the last question, Mr. Krill. During the course of your direct examination, you testified as to your recollection of the number of feet that you had

proceeded down the southeast sidewalk on Albemarle Street.

A. Yes, sir.

Q. And during the course of cross-examination, you were asked how many steps you had taken down the southeast sidewalk of Albemarle Street and I want to review that with you.

Can you tell us with any accuracy, any exactness, how far down Albemarle Street from its intersection with Wisconsin Avenue on that south side of Albemarle Street you had proceeded after you left Peoples Drug Store? A. Well, as I said before, I can only give you my best recollection. I can't be very exact about these distances because I had no reason at that time to make a note of them, a mental note. I know that I had not gone any great distance and that I was near a telephone pole and somewhere in 15 or 20 feet of a downspout, that I fell. But as to exactness, there is no way of telling this.

320 Q. Now, isn't it a fact that, Friday morning of last week I showed you a map drawn to scale which showed exactly the length of Peoples Drug Store in 1962 and the exact location of the downspout and the telephone pole? A. Yes, sir.

Q. And did you have an opportunity Friday, for the first time, to see such a scale drawing? A. That is correct, sir.

Mr. O'Donnell: Objection, Your Honor, this is way out of the scope of the cross-examination. This is opening up a whole new area.

The Court: My recollection is that you asked a great many questions about those distances, Mr. O'Donnell.

Mr. O'Donnell: Well, I think the map will speak for itself, Your Honor.

(Mr. Frosh handed a map to the clerk.)

The Clerk: Plaintiffs' Exhibit No. 5 marked for identification.

(Map was marked Plaintiffs' Exhibit No. 5 for identification.)

By Mr. Frosh:

Q. Mr. Krill, I hand you now what has been marked for identification as Plaintiffs' Exhibit No. 5 and I ask you if you can identify for us the downspout on the
321 Peoples Drug Store building?

Mr. O'Donnell: Objection, Your Honor.

The Court: What is the objection?

Mr. O'Donnell: He has already testified he didn't know where the downspout was; this map wasn't drawn by him; the purpose of this map is being used for distances in feet. He testified on direct examination or to a question of mine that he didn't know where the downspout was, he wasn't even sure it was at the end of the building, he didn't know who owned the downspout, he didn't even know whether it was functioning and I think this is way out of the discretion the Court has given Mr. Frosh.

The Court: I do think that if he doesn't know where the downspout is—

Mr. Frosh: Well, I thought he testified Friday where the downspout was, according to his recollection, and I will ask him or the reporter can reread the notes. My recollection is quite clear as to where he said the downspout was, at the end of the building. And we have a scale map that Mr. O'Donnell has that shows it is there.

The Court: What is your recollection?

Mr. O'Donnell: My recollection is, to a question of mine, he said he thought the downspout was either at the
322 end or near the end of our building; he did not know where it was positively and I asked him this specifically. I asked him the question, did he know who owned the downspout, I think he testified he did look up the downspout and saw it coming down from a roof.

The Court: Now, you are asking him to take this exhibit which he hasn't made and nobody has yet testified that it represents what was there in 1962.

Mr. Frosh: That is true. The Court please, I was going to simply ask him if this refreshed his recollection and permitted him to identify, assuming it is correct, because

I am not going to offer it as my exhibit, assuming it is correct, can he now identify where he fell?

Mr. O'Donnell: I would object to that, Your Honor.

The Court: I will sustain the objection.

Mr. Frosh: We will not use it at this point.

By Mr. Frosh:

Q. Mr. Krill, during the course of the testimony both by Dr. Hand and by Dr. Baker, there was testimony as to when you ceased walking with crutches. Can you tell the Court and the jury your best recollection of when you ceased using crutches or a cane after 1964? A. My
323 best recollection is that it was in late May or in June, in 1964.

Q. Now, when you went to see Dr. Radice in 1964, in March, do you recall whether or not you were on crutches when you went to see him? A. Yes, sir, I was on crutches at that time.

Q. And did you discuss with Dr. Radice the question of uses of crutches? A. Yes, sir. He told me that he wanted me to use the crutches to be certain that I did not fall, but that I should, on as many occasions as I could, try to walk without them.

Mr. O'Donnell: I object to this, this is all hearsay.

The Court: The objection is sustained as to what the doctor told him.

Mr. Frosh: Well, I heard no objection to—I thought that Dr. Hand, having testified in place of Dr. Radice, that it would cease being hearsay since both the physician and the plaintiff have testified.

The Court: He can testify to what time he used them, but not what somebody said to him.

Mr. Frosh: All right.

By Mr. Frosh:

Q. Now, do you have any way that helps you to recall to mind your use of crutches in May or June of 1964? A. Yes, I do, because I was not able to
324

climb stairs or to go up and down steps without some support that would prevent me from falling.

Q. And is this the method by which you recall the use of crutches in May or June of 1964? A. Yes, that is the method, one of the methods.

Mr. Frosh: I have no further questions.

Recross-Examination

By Mr. Cashman:

Q. Mr. Krill, is it my present understanding that you are unable to locate with specificity, that is with some degree of accuracy, the place where you fell? A. That is correct.

Q. Mr. Krill, with respect to the testimony that you have given in this case in chief, that is the time you were on the stand before, and the testimony that you gave when your deposition was taken under oath, do you recall, sir, that your testimony in terms of how far you had walked once you had left the entrance was five or six steps or sometimes you would phrase it five or six strides, or alternatively,

325 "I took a few steps." Do you recall that that has been your testimony earlier? A. Yes, and in addition I once said 30 or 40 feet, because I can only do this by recollection.

Q. That is correct, sir. But the most you have said, according to my recollection and correct me if I am wrong, is 30 to 40 feet. Would that be a fair statement? A. I believe that is correct.

Q. All right. In terms, Mr. Krill, of your deposition—Your Honor, I am referring now to page 14:

"Q. You said you started to walk in this area without realizing—without realizing what? A. "That it was that slick and that icy. If I had seen that I wouldn't have gone down there. There was no particular reason to see it because it was light and clear here, and I just assumed that I would walk on down the sidewalk. I had just taken a few steps when I hit the ice."

Now, Mr. Krill, do you recall that that was your testimony?

A. That is right, that is one of the designations that I used, because I have no way of fixing it, I have never measured it, I had no reason to remember exactly.

Q. Yes, sir, I am aware of that. I am just letting you know that your characterization at that point was
326 that you had just taken a few steps when you hit the ice.

Now, with respect to another location in your deposition where you described it again—this is on page 23, Your Honor; and I am reading from line 4, Mr. Krill:

“Q. Now, would you describe for me what happened to you as you left the drug store? “A. On leaving the drug store, I walked—turned to the right to go down Albemarle to the east, to go back to the car on the south sidewalk—

“Q. Yes. I see. “A. —and the area at that point was—I found to be very slippery and icy, and I had taken a few steps and slipped on the ice and fell, and that where the injury occurred.”

Again, Mr. Krill, your characterization at that point was a few steps.

Now, I am referring to the same page, line 18, this was after we were talking about reasonably good visibility, my question was:

“Q. I see. Now, when you left the store and turned to your right to go along the south side of Albemarle Street, what did you notice in front of you?

327 “A. Well, I didn’t notice anything significant except that as I left the store, immediately, I was in the cleared area and the light from the doorway there—there was no reason not to walk on down that sidewalk. I didn’t see the ice until after I had walked into the area right adjacent to the door, until after I had walked into it. The area right adjacent to the door had been cleared, as I said before.

“Q. How far into the icy area did you walk before you

realized that you were in it? "A. Well, I think five or six steps."

Now, at this point again, Mr. Krill, your characterization was five or six steps.

The Court: Now, what is your question to him?

Mr. Cashman: What is my question, Your Honor?

The Court: To him:

By Mr. Cashman:

Q. Is your testimony that you had taken five or six steps or taken a few steps, as I have indicated in your deposition, is that what you did do in fact, is that your best recollection, Mr. Krill, of what amount of distance you had traveled? A. Yes, it is. This is merely a different way of saying the same thing. Since I can only estimate, I merely used different terminology in trying to say the same thing.

Q. I see. Now, considering all the testimony that you have given both in your deposition and in the lawsuit, the most you would say you have traveled would be how far? A. I would say 30 or 40 feet, the same as I said there.

Q. 30 to 40 feet. Would you say, Mr. Krill, that you could step 30 to 40 feet in five or six strides? A. Not if you use that analogy, no.

Q. The only reason I am using it is because, of course, you used it, you know, in describing your accident. A. I realize that, but this is merely a different way of trying to say the same thing. I have no way of being exact about it.

Q. I understand you can't accurately place the spot of your fall, and was it not your testimony that you walked into the area and, without realizing it, you were in an icy area and as soon as you had realized it, you went down, is that right? A. That is right.

Q. And you assumed that you went down on one of these icy footprints, is that right? A. That's it, yes, sir.

Mr. Cashman: Your Honor, in fairness to Mr. Krill and to complete my description of the descriptions that Mr. Krill has made with respect to how far he had walked after he had left the drug store, on page 37, line 2, Your Honor, the question was asked:

"Q. Approximately how far down the building had you negotiated before you fell? "A. Well, this is a little hard to say. Perhaps 30 or 40 feet. But this is a rather hazy recollection. I don't really know."

Mr. Frosh: Will you read the next question?

Mr. Cashman: Certainly. I didn't mean to avoid it:

"Q. Had you almost come to the end of the building? "A. I think it was more on the rear end of the building than it was at the front end."

Mr. Frosh: Would you also read page 42, line 7 to 15?

Mr. Cashman: Pardon me?

(Mr. Frosh conferred with Mr. Cashman.)

Mr. Cashman: Your Honor, I will say before I read this that this related now not to the liability of the District of Columbia, but rather to the liability of the Co-defendant. I don't think it is my place to read this part.

The Court: Very well, you need not read it if you do not wish to.

Mr. Cashman: You may read it, if you wish.

Mr. O'Donnell: I am going to object to it being read, it has no relevancy at this time. He has already testified along these lines rather specifically.

Mr. Frosh: Your Honor, I think in fairness to Mr. Krill—

Mr. O'Donnell: May we approach the bench for this discussion, Your Honor?

The Court: Yes.

(At the bench:)

Mr. O'Donnell: He has already testified rather specifically to these things. Is he going to refresh his recollection now by something he said at the time of the deposition?

The Court: Page 37, what do you want to show?

Mr. Frosh: He read 37 and I wanted to have him also read page 42, I think it is 42.

(The Court read the indicated portion of the transcript.)

The Court: This is something about this downspout.
331 Mr. Frosh: That is right, and I recognize it applies to Mr. O'Donnell's portion of the case.

Mr. Cashman: That is the reason I didn't want to read it, Your Honor.

Mr. Frosh: But I think the jury is entitled to see he hasn't changed his testimony, that he did testify to that both in his deposition and in his cross-examination.

The Court: Well, he testified about the downspout.

Mr. Cashman: He did, Your Honor, he said 10 to 15 feet from the end of the building.

Mr. Frosh: Twenty, as I recall.

The Court: He said he was 20 feet from the downspout when he was down, according to what I understood.

Mr. Frosh: I simply feel, in fairness to him, since they used the deposition to say he took five or six strides, as Mr. Cashman rightfully did, read the rest of the testimony to show he was nearer the end of the building, that this also be read to show he hasn't changed his testimony at all, otherwise the jury may get the impression he didn't mention the downspout until yesterday.

Mr. O'Donnell: I object, Your Honor.

The Court: I overrule the objection.

Mr. O'Donnell: I don't know what purpose this
332 has in this case at this time. Is he attempting to refresh the witness's recollection? What is the purpose of proffering something of this nature, is it to impeach him, is it to bolster up his direct testimony, something further of this nature? I think under the circumstances it might very well come, I don't know within hearsay, but it is not direct testimony, it has nothing to do with this litigation, Your Honor.

Mr. Cashman: Let me say this, for my own part. I used the deposition—

The Court: I understand your part perfectly. You mean this lies in the area that you consider is the Peoples Drug Store and, therefore, you are not going to enter it.

Mr. Cashman: Exactly, Your Honor.

The Court: However, even though you didn't go into it, the witness did refer to the downspout, he has done it in his direct, I mean in his cross when you had him.

Mr. Cashman: Yes, that is right.

The Court: You don't want to examine him further?

Mr. O'Donnell: Just on a couple points he said on rebuttal or redirect. But as far as this is concerned, I think it is improper to have this read to him at this time, since he has already testified, he is here in person and he
333 has already testified to all these facts.

The Court: I think it is a minor point and you may ask him the question.

(End of bench conference.)

Redirect Examination

By Mr. Frosh:

Q. Mr. Krill, when you testified in your deposition, and I am referring to page 42, lines 3 to 15, were you not also asked the question:

"Q. You also testified, Mr. Krill, that the fall occurred more at the end of the Peoples Drug Store building—is that correct? "A. That is correct."

And did you not also have the question propounded:

"Q. As you approached the approximate area of the fall, did you have opportunity to observe a downspout at that particular area of the building? "A. Yes, I did, and that is what made me think it was the end of the building, because there is a downspout that comes off the building, or that is also a sort of a jog in the building line, that indicates the end of the building. That is the only way I recall that
334 it was down at that area of the building that the fall occurred."

Did you not also make that answer?

A. Yes, I did.

Mr. Frosh: I have no further questions.

RECROSS-EXAMINATION

By Mr. O'Donnell:

Q. Mr. Krill, I think you indicated that recently you went up by this store and there were some changes made, as the officer said, in the store. But as a Secret Service agent, trained in observation in distances and feet, could you give us your best estimate of the distance from this door down to the end of our building?

The Court: At the present time?

Mr. O'Donnell: Well, we will do it at the present time. Thank you, Your Honor.

Mr. Frosh: May I object, I just think it is irrelevant, what his best guess is as to what the distances are today.

The Court: Very well, I will sustain the objection as of the present time. You can ask him as of that date.

By Mr. O'Donnell:

Q. As of December 24th and any time after that occasion that you had an opportunity to drive by this scene,
335 as you told us in your direct examination, and you looked at the scene and referred to it as the place where you fell, now how far is it, to the best of your recollection, or can you even tell us, from here to here (indicating)? A. I can't tell you with any degree of accuracy because I have never had any reason to contemplate this.

Q. Thank you. Now, if this area was approximately 100 feet, let's assume those facts, and let's assume further that this whole area, as you have testified, was nothing but ice and frozen ice and hummocks and it was at least three or four inches deep and was frozen and icy, assuming those facts, how many strides would it take you ordinarily from this area here to walk to the end of the building which is, assuming for the purpose of this question, around 100 feet?

A. Based on your assumption, it would take 30 strides or so.

Q. Then that would be approximately three-and-a-third feet strides, is that correct? A. That would be correct.

Q. And was it your earlier testimony that the average stride is around two-and-a-half feet? A. That is right.

Q. Is your stride a foot longer than the average
336 mans? A. I don't know.

Q. Do you think it is? A. I don't think so.

Q. Let me say this, too, since this entire area is covered with ice and snow, hummock, hillock, and everything else, would you take the normal stride if you are in ice and snow or would you have a tendency to reduce the distance of your stride for safety purposes? A. This is based on your assumption. I would, if I knew I was in ice and snow, reduce my stride, but I didn't know that when I entered it.

Q. I know, I am giving you a hypothetical question. The average person would reduce his stride if he was in an area, as I indicated, covered with ice and snow, three to four inches, hummocks, hillocks, and everything else? A. I believe he would, yes, sir.

Mr. O'Donnell: May I have this, Your Honor, a letter from Dr. Radice to Mr. Frosh, dated April 24, 1964, marked as Defendant Peoples Exhibit No. 4 for identification?

The Court: Yes.

(Letter dated April 24, 1964, from Dr. Radice to Mr. Frosh, was marked Defendant Peoples Exhibit No. 4 for identification.)

337 By Mr. O'Donnell:

Q. Now, in response to a question by Mr. Frosh just a few moments ago, am I correct that your testimony is to the effect that you continued on crutches until at least May or June of 1964? A. That is my best recollection, sir.

Q. And after May and June of 1964, is it further correct that your testimony is that you used a cane? A. Yes, sir.

Q. And how long did you use a cane? A. Not very long, I don't believe, that was the last two or three weeks.

Q. Two or three weeks, this would bring you into July of 1964, the early part or the middle part? A. Yes, sir.

Q. Now, have you had an opportunity to read the letter from Dr. Radice to Mr. Frosh, dated April 24, 1964? A. Yes, sir, I have seen that.

Q. And you recall that Dr. Radice in that report, which would be approximately three months before the time that you have mentioned that you were off the cane, that Dr. Radice said: At the present time the draining sinus is completely healed and the patient is walking without the
338 aid of a cane or crutches. You recall reading that?

A. I do.

Q. Is Dr. Radice incorrect in his statement here that three months before you say you were off the cane and crutches, that you were in fact off the cane and crutches? A. I don't believe Dr. Radice meant this as a general statement.

Q. Well, words convey certain meanings, as I understand it, and wouldn't that be what the doctor said? At the present time the patient is walking without the aid of a cane or crutches. A. Well, I could characterize it this way, he was asking me to walk without the aid of the crutch when I could or without the cane when I could, but this didn't mean that I discarded them.

Q. Mr. Krill, I am not going to argue semantics with you— A. I don't want to argue either, I just want to tell you what I think he meant.

Q. And am I further to assume from your recent testimony that in your capacity at the Secret Service that it is not necessary for you, because of your position, to keep accurate leave records, is that correct? Is that what you
339 are trying to tell us? A. That is correct, but your wording is not quite correct. I don't like the wording "accurate leave records." The leave records are accurate for the leave that was taken, but I do not account for my time in small segments, as I would if I were reporting on a straight 8-hour day.

Q. But it is my recollection that these records show that you took 75 days of sick leave but your claim here today is for approximately 103 days? A. That is right, because some of the leave that I took during my illness was not sick leave, as I mentioned to you yesterday.

Q. So, what you are telling us is you were juggling annual and sick leave? A. That is right, this perfectly permissible because we lost annual leave if we don't take it.

Q. It is perfectly permissible to whom? A. To the government.

Q. To the government to juggle annual and sick leave? A. You can be sick and charge it to annual leave.

Q. Are you speaking on the part of the Secret Service or are you speaking on the part of the government in general? A. Well, I can't speak for the whole government but—

340 Q. But at Secret Service you can do this? A. You can do this, you can be ill and charge it to annual leave if you want to, otherwise you lose your annual leave but you do not lose your sick leave.

Q. And further, it is my understanding that you were taking leave, whether annual or sick or comp. or something, up to July of 1964 because you were unable, until 1964, to work full time, is that your testimony? A. That is right.

Q. Although your leave records show that, as a matter of fact, from approximately April 15 until around July 15, a period of three months, there are only three hours, I believe, of sick leave or annual leave charged? A. This would be correct, because there is much compensatory and other time involved that is not reflected.

Q. Now, you admit today that the distance from your house to Sibley Hospital is not the 5 miles or approximately 5 miles that you told us yesterday, but in fact by your speedometer 2.3 or 2.4 miles, is that correct? A. I might say this—

Q. No, answer the question yes or no. A. That question is correct, yes.

Q. And also that the distance from your house by
341 your car to Dr. Radice's house is 6.4 miles and not
the 8 miles as claimed, is that correct? A. That is
right, and not the 5 miles that we talked about yesterday,
either.

Q. Well, leave that as it is for now. Now, did you measure the distance from your house to the Washington Clinic last night? A. Yes, I did.

Q. And as I recall your direct testimony, you said it was 4 miles and that was the claim that was made, it was 4 miles, what did your speedometer show there? A. I believe it was 2.6 or something like this, something around 2.5, 2.5 or 2.6.

Q. None of these figures that you have given yourself, under oath have been correct or accurate? A. That is not correct.

Q. All right. Would you consider a distance 50% less than that claimed under oath accurate? A. Under the conditions that I made up an estimate of those thing I could not furnish statements for, I would not consider this out of order. 96% of the bills I gave you, I gave you checks for, 4% I had to estimate, and I overestimated the distance perhaps and underestimated the number
342 of trips. There were many more trips than I put in.

I merely tried to make an average of what I couldn't do otherwise.

Q. That you made? Didn't Mrs. Krill actually go to the hospital twice a day and not you? A. That is correct, she went four or five times a day.

Q. Well, I just wanted to clear this up. Thank you, Mr. Krill.

The Court: Has everyone finished now with Mr. Krill?

Mr. Cashman: I have no further questions, Your Honor.

The Court: You may step down, Mr. Krill.

(Witness excused.)

The Court: It is about the luncheon recess time now and so we will have the luncheon recess now until 1:45.

(The luncheon recess was taken from 12:30 until 1:45 p.m.)

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[PROCEEDINGS]

[Tuesday Afternoon, April 5, 1966. 1:45 p.m.]

[The jurors entered and took their positions in the jury box.]

The Court: Are you ready to proceed?

Mr. Frosh: Yes, we are, Your Honor.

Mrs. Krill, take the stand, please.

Thereupon——

Mrs. Mae Morgan Krill.

a co-plaintiff herein, was called as a witness in her own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Frosh:

Q. Mrs. Krill, be sure and speak loudly. Would tell us your name, please? A. Mae Morgan Krill.

Q. Where do you live? A. 5007 Randle Lane, Washington, D. C.

Q. You are the wife of Mr. Jackson Krill? A. I am.

Q. Would you tell us how long you have been married? A. Thirty-two years.

Q. Mrs. Krill, I want to direct your attention this afternoon to December 24th, 1962. I want you to tell the
344 Court and the jury, if you will, where you and Mr. Krill had been on the afternoon of the 24th near the hours of 4:00 to 5:00 o'clock? A. We had left our home about 4:00 o'clock to deliver a gift to a Mrs. Willard Hall, a very close friend of mine, who had a daughter at that time fourteen, the age of mine. She lost her husband four years

before and I was always very close to her. We took her a gift. I took the gift in to her. He didn't get out of the car. We drove from her house, 2744 Chesapeake—I am not sure of the address. I know the house. We drove back down Linnean Road, back up Albermarle and parked the nearest spot to People's Drug Store that we could find on the right-hand side. And you cannot park in front of that liquor store. There is a stoplight and you cannot park there.

Q. Mrs. Krill, would you tell the Court and the jury what, to your knowledge and observation, Mr. Krill did after the car was parked there? A. He got out of the car and went up the side of the street that the car was parked on, crossed and went into People's Drug Store.

Q. Now, could you see him as he walked up to Wisconsin Avenue? A. Yes. I saw him come out of People's Drug Store and come down the other side of the street. And he was going to cross on the street on one side, 40th is 345 the other, which is a short distance there, and as I saw him fall I got out of the car. I realized it must be the ice. I got out of the car and after I crossed the street there at Fort Drive a lady asked me if I was the lady that got out of the green car. Apparently she was watching me. And I said, yes. She said—

Mr. Cashman: Your Honor, this is hearsay testimony and it is objectionable.

The Witness: All right. I went to him.

Mr. Frosh: Just a minute. Let me ask you a couple of questions.

By Mr. Frosh:

Q. Can you tell us who was driving your car after you left your friend's home? A. My husband.

Q. And there came a time when you saw a woman. And did there come a time when you had occasion to see your husband after he had fallen? A. Yes.

Q. And, would you tell us how you got to him and what you saw and observed when you got there? A. I walked up to him and I looked to see what had happened, and when

I got there there were two young boys lifting him up. I said, what happened? He said, I slipped on the ice. And I looked just to observe for a second, but you must remember
 346 in an emergency like that you don't see anything, to see what caused it, and you want to get help. So there was ice everywhere and the boys were afraid I would fall. My husband was afraid the boys would fall with him.

Q. What did you do then? A. I went back and got the car and drove it up on the wrong side of the road because the boys told me to, the street. They lifted him in the car and my first thought was—I saw where he fell from the entrance of People's Drug Store to the end of the drug store. I know he fell there on ice regardless of footage or anything. Then—

Q. Let me interrupt you. Did you have occasion to make any observations other than that there was ice all around?

A. I did not. At that point, no. At a point like that no mother or wife would or could be cruel enough to think of any footage, how far you were from anything. What I did was get him to the doctor and pray to God that he was not hurt seriously.

Q. How did you get to the doctor's office? A. I drove.

Q. And would you tell us the route that you took? A. Well, I went to Washington Clinic because I know so many doctors there, and I knew I had to have a doctor. I drove up to the entrance. The entrance was clear at the
 347 clinic. Dr. Davis was the doctor there, a pediatrician that I used with my youngest daughter, and he came to the car and immediately said, you need an orthopedic doctor. He phoned Sibley Hospital for me.

Q. You did not? A. I did not. He phoned Sibley and made the arrangements, as well as I recall, to have the orthopedic doctor, his Dr. Radice, who was supposed to have been there on an emergency Dr. Davis said to me and, apparently, he was.

Q. Did there come a time when you got to Sibley Hospital?

A. Yes.

Q. Did there come a time then when you met Drs. Baker?

A. Yes. I guess the Good Lord was with me. He was coming

out the door and I stopped. I was on my way to the ambulance entrance to the hospital. And I wasn't really sure where the ambulance entrance was at that time. And that is one reason I stopped.

Q. Mrs. Krill, did you tell them at the Hospital Center or at Sibley Hospital what had happened to Mr. Krill?

A. As I recall, I told the boys that helped him out of the car at Sibley and I believe they were on the desk in the emergency room. I could be wrong. There could have been someone else, but all I remember is the two men came
348 and helped him out of the car and I told them that he fell on the ice.

Mr. Cashman: I object, Your Honor.

The Court: You are not to give conversation.

The Witness: All right.

Mr. Frosh: Just what you did.

The Witness: All right.

By Mr. Frosh:

Q. Mrs. Krill, let me ask it this way. Did there come a time when you made any report to the District of Columbia Police or to Sibley Hospital that identified the location of wheres Mr. Krill had fallen? A. I told Sibley Hospital.

Q. What did you tell them? A. That he fell on Albe-
marle Street on the side of People's Drug Store on—

Mr. O'Donnell: Objection.

The Court: The objection is sustained. The answer will be stricken. The jury will disregard it.

Mr. Frosh: When Mr. O'Donnell or Mr. Cashman make an objection, Mrs. Krill, you must stop and let them inter-
rupt.

The Witness: I am sorry.

By Mr. Frosh:

Q. Mrs. Krill, did you when you came to where your
349 husband was observe a downspout or anything of that nature with reference to People's Drug Store, the building? A. I did not.

Mr. O'Donnell: Objection, Your Honor.

The Court: She said she didn't. Do you still want to object?

Mr. O'Donnell: I didn't hear that.

By Mr. Frosh:

Q. And you have already told us, Mrs. Krill, that you made no effort to notice where he had fallen with relation to anything around there; is that correct? A. Not footage or anything. I just know he fell on the ice on the sidewalk between the front and end of People's Drug Store on Albemarle Street.

Q. Now, Mrs. Krill, to your knowledge, how long was Mr. Krill in Sibley Hospital on that first occasion? A. I believe he entered December 24th and I think the day I went down to—I talked Dr. Radice and Dr. Baker into letting him go earlier. They didn't want to because he was completely helpless and were afraid I couldn't handle him at home. I had a 14-year-old daughter and aged mother almost blind to care for at home. But they didn't want me to try and I told them I was strong and I could. And I believe that was the 26th or 27th of January that he left and I
350 drove him home. They brought him in a wheelchair to the car.

Q. Now, during the period of time that he was in the hospital did you have occasion to visit him? A. I spent most of the day there. However, as I say, I had to leave home and leave my 14-year-old and aged mother, and I made three and four trips a day, not two as Mr. Krill turned in. I made three and four and sometimes five trips a day. I had a home to care for plus Mr. Krill.

Q. When you saw him there at the hospital did he appear to be in any pain and discomfort? A. Yes. He was put in traction that first night, the 24th, because they wouldn't operate. Dr. Radice explained the operation room was closed on Christmas Day. So he was in traction on Christmas Day, which I spent with him, and my mother and daughter spent Christmas at home by themselves.

Q. Would you describe that? A. Well, the leg was swelling. I was trying to get him in a tub to give him hot sitz baths because it pained him so. And I was putting a heat pad to it and all, but to get him in and out of a tub was so dangerous, and he had to lean on me and the crutch and everything, so I decided a heat pack would make that feel better and be a lot safer than hot sitz baths. Dr. Baker suggested hot sitz baths but he was so hard to handle getting in and out of the tub I started putting a wet pack and heat pad on that; and I think that might have brought that blood to the surface, which the doctor said was a good thing.

Q. While you were at Sibley Hospital immediately after the accident took place, did you have occasion to see any representatives of the District of Columbia Government? Where there any police officers or anybody else there? A. No.

Q. Did you make a report of the accident to anybody? A. A police officer phoned my husband's room that night, 604 Sibley Hospital. I remember the room very well. And he talked with my husband about it.

Q. Did there come a time when any representatives of People's Drug Store were there? A. Absolutely. A 358 Mr. Murphy came to the hospital. He was very kind and sympathetic and sorry it happened. And he asked me to keep a record of all my expenses——

Mr. O'Donnell: Objection, Your Honor.

The Court: Just a minute. The objection is sustained as to what was said.

Mr. Frosh: If the Court please, may we approach the bench?

The Court: Yes.

[At the bench]

Mr. Frosh: In the pretrial statement and in the listing of witnesses I have given People's Drug Store the name of Mr. Murphy as a person who came to the hospital. And we claim that at Mr. Murphy's suggestion Mrs. Krill did keep

the records that later were supplied; and that he did, in fact, say to her that "we will make everything good on this." And I am submitting that this is an admission against the interests, and an admission of liability; and this is the basis on which I am submitting that.

Mr. O'Donnell: Your Honor, this is as far-reaching as anything I have ever heard as far as having any relevancy in this particular action. It, obviously, isn't admissible against interests.

The Court: He was not an employee of People's Drug Stores. He is an employee of People's Insurance.

Mr. Frosh: He never identified himself as such.

359 Mr. O'Donnell: I don't think there has been any question in your mind.

Mr. Frosh: Not in my mind, of course.

Mr. O'Donnell: And not in her mind. And I don't know what this has to do with this case. It is not an admission against interests.

The Court: You don't know who he represents?

Mr. Frosh: All I can tell you is that I have discussed his appearance with Mrs. Krill. She told me that he said to her he was a representative of People's Drug Store, and that he was sorry the accident had taken place, and that he wanted her to keep a complete and accurate record and they would make it good.

The Court: Well, that is all hearsay.

Mr. O'Donnell: I would like Your Honor to tell the jury to disregard all that.

Mr. Frosh: Wouldn't it be an admission against interests?

The Court: You haven't established who he was.

Mr. Frosh: We have established he said he was a representative of People's Drug Store.

The Court: I know but that is the rankest kind of hearsay, what he said. He didn't say it under oath.

Mr. Frosh: That is true, but supposing a manager
360 of People's had come to her and said, I am the manager?

The Court: Well, if you could establish he was the manager of People's.

Mr. Frosh: It was hearsay as to what he was.

The Court: I will have sustain the objection to this.

Mr. Frosh: Very well.

[In Open Court]

The Court: The jury is to disregard what the witness said that a Mr. Murphy said.

By Mr. Frosh:

Q. Mrs. Krill, after the second episode of the hospitalization of Mr. Krill, can you tell the Court—And that would be when? A. August, the latter part of August.

Q. Of 1963? A. That is right.

Q. Can you tell the Court and jury what you had occasion to observe so far as the course of his progress was concerned? A. Well, it was slow then because they couldn't get the wound to quit draining, and the doctors weren't even sure themselves. I took him to Hunter Laboratory several times for cultures, and finally they decided, I guess, it was the plate that caused it. After that infection, I don't
361 know, it just hadn't cleared up or something, but he was in constant pain.

Q. Did there come a time when he was hospitalized for the removal of the plate? A. That is right.

Q. And, Mrs. Krill, did there come a time when the doctors gave you the plate that had been removed from Mr. Krill's leg? A. That is right.

Q. Did you bring that plate with you? A. I did.

The Deputy Clerk: This is plaintiffs' exhibit number 6 marked for identification.

(Plaintiffs' Exhibit No. 6 [Plate removed from patient's leg in hospital] was marked for identification.)

By Mr. Frosh:

Q. Mrs. Krill, I hand you what has been now marked plaintiffs' Exhibit 6 for Identification, and I ask you if you can tell the Court and jury how that fits and what that is? A. This is the one that the doctor described. This [indica-

ting] is the pin. This [indicating] is called the plate. This fits up in the side of the hip here [demonstrating].
362 This [indicating] comes on the bone, the femur bone, to support it.

Q. Is that the pin and the plate that the doctors gave you?
A. That is right. It screws in there [indicating].

Mr. Frosh: We ask that this be admitted as plaintiffs' exhibit 6.

Mr. Cashman: No objection.

Mr. O'Donnell: No objection.

The Deputy Clerk: Plaintiffs' Exhibit Number 6 is marked in evidence.

(Plaintiffs' Exhibit No. 6 was received in evidence.)

Mr. Frosh: Your Honor, may I hand this to the jury?
The Court: Certainly.

[PX No. 6 was passed among the jurors for examination.]

By Mr. Frosh:

Q. Mrs. Krill, have you the obtained the name of the woman who came up to you on Albermarle Street, or the names of the two men who aided your husband in getting into the car? A. Not the lady. I did ask the boys for their names because what I had in mind—I said, thank you
363 boys and I hope you have a happy Christmas—and I had thought how nice to write a note later, but in the shuffle and everything, home and hospital and my family, I misplaced them. I think I accidentally threw them out. I do remember a Harold Davis, I believe. That is all I can remember.

Q. You have never seen nor heard from any of these people since the day of the accident? A. No.

Q. During the time of Mr. Krill's recuperation, did you have occasion to drive him to the doctors or any place else?
A. Yes. He couldn't drive a car for months.

Q. Now, during the course of the testimony of the doctors you have heard reference being made to when Mr.

Krill was no longer using crutches. Do you have any independent recollection of when he ceased using either crutches or a cane? A. I think, like most women and mothers, I connect my husband with my child. The earlier part of June.

Q. Of what year? A. Well, this would be 1964, which would be after this third operation in February. The 14-year-old was in school and we went to a school program. He hadn't been able to go to any school functions for over a year and she wanted him to go with me. And he wanted to go. And I was afraid for him to get in a crowd because
364 that leg was still weak and I was afraid he would lose his balance. That is when he used sometimes a cane or crutch when we would get in a crowd or if we go to church. Our church has stone walks and he couldn't walk up the steps because he still couldn't use that leg. It wasn't strong enough. After all, it was February 19th when they had opened the big wound again. And if it was rainy he would take one crutch and he would use one crutch to go up the steps and hang with his bad leg on that side onto me. And then if it wasn't rainy and we would think he needed the support he would take the cane. Sometimes I would take the cane on my arm and kid him and he would hang onto me on this arm and I would say I will carry it until you need it.

Q. You do recall in June of 1964 he was using the crutches still? A. Yes. And I remember July 4th of that year I took him to Rehobeth Beach. We both used to like to swim and he hadn't been able to swim for so long, and we took both the crutch and the cane because on the boardwalk it is a little rough in spots and he wasn't sure of himself. And sometimes he would use the crutch and sometimes the cane, but just one crutch is all.

Q. After July of 1964, however, was he able to manage without the crutch and the cane? A. As I recall, yes.
365 But he had to be careful, and the leg was still weak and he hadn't used it for a long time. At that time

his leg wasn't as large as the other but now there is no difference. But there is a weakness in the muscles and all.

Q. Did you see a difference in the size of Mr. Krill's two legs? A. Oh, yes. When he was in his shorts, I could see that, but now I can't see any difference.

Q. So the injured leg has regained its shape? A. Yes. It was sort of shriveled at that time.

Q. Can you tell the Court and the jury whether there is any remaining inability to function by Mr. Krill that you have been able to observe? A. Yes. He can't stand on his feet as long and he can't work in the garden as long. He can't mow the terrace at home like he used to.

Q. Are there any other functions around the house that Mr. Krill used to perform that he cannot perform at the present time? A. I can't think of anything particularly. Now, he can't sit in a real soft chair very long at a time, but as far as little odd jobs around the house, he can't take care of the plumbing, or he couldn't do so for a long time.

Q. At the present time he has fairly well resumed carrying on most of the functions he had performed before?
366 A. That is right.

Q. Was there any discernible change insofar as his personality or attitude to you during this period of illness? A. Well, he is a very kind husband and father. He was very depressed during that time. He didn't have as much to say to me.

Q. And did this persist during the entire period of his illness? A. Yes.

Q. And at the present time he is fairly well recovered?
A. That is right, he is normal about it.

Mr. Frosh: You may inquire.

Mr. Cashman: I have no questions of the witness, Your Honor.

Mr. O'Donnell: No questions.

The Court: I would like to ask you a question. What did your husband normally do around the house or the yard before this accident?

The Witness: Well, he mowed the grass and we have a sliding door on the garage, and sometimes those doors don't always work, and he could fix that. It broke, of course, and I had to get my neighbor across the street to fix it for me. I had to get the students or anyone I could get to mow the grass. And he would wash the car and take care of the
 367 faucets and help me carry the winter clothes up into the attic. We have a stairway that pulls down. He no longer can do that and I couldn't always get the heavy things up there. I had to get help to do that. And he would help me with cleaning the rugs. He couldn't do anything like that. He couldn't even dress himself for months and months. And I might say too, Your Honor, that for five months, once a week or every ten days, I drove to Sibley Hospital. He didn't make any record of this to produce yesterday in those estimates. He forgot it. But I got Orderly McPhail, who is still at Sibley, and he is a licensed barber too, to cut his hair all the time he was in the hospital. For five months afterwards he was unable to get in a barber chair because he couldn't put his weight down on that leg. Normally, you could put your weight down in three or four months, but it took five to six months. So we didn't get him in a barber chair. And I would have to drive, whenever Orderly McPhail could come, to Sibley Hospital and back and fix the newspaper and the pan and let him cut his hair. And then I would have to take Orderly McPhail back to Sibley so he could catch his bus. He was very kind to help me out. I don't know how we would have gotten his hair cut otherwise.

The Court: Now, is everyone through with Mrs. Krill?

Mr. Frosh: Yes, Your Honor.

The Court: You may step down.

368 Mr. Frosh: May it please the Court, counsel for the defendants and I have agreed that the plaintiffs may introduce into evidence as plaintiffs' exhibit number 7 the local climatological data which has been received from the United States Department of Commerce Weather Bu-

reau for the month of December, 1962, and that I may read at this juncture the portion of this one part of the exhibit that relates to the dates, maximum, minimum and average temperature, the total amount of snow and sleet in inches and the—Well, I believe that is all I will read, and counsel may read anything additional they may want to read now or later.

Mr. Cashman: With that stipulation, I have no objection, Your Honor.

Mr. O'Donnell: No objection, Your Honor.

Mr. Frosh: Ladies and gentlemen of the jury, the local climatological data from the U.S. Department of Commerce Weather Bureau reveals that:

On December 21, 1962, there was a 5.3 inches of snow and sleet in the Washington area, and this would be measured at the National Airport. The maximum temperature on the 21st was 32°. The minimum temperature was 22°. The average was 27°.

On the 22d of December, 1962, there was no precipitation.

The maximum temperature was 38°. The minimum
369 was 24°. The average was 31°.

On the 23d of December, there was no precipitation. No inches of snow. The maximum temperature was 44°. The minimum temperature was 25°. The average temperature was 35°.

On the 24th day of December, 1962, there was no snow nor sleet that precipitated on that day. The maximum temperature was 34°. The minimum temperature was 33°. The average temperature was 29°.

Now, one other item. Snow, sleet or ice on the ground at 7:00 o'clock a.m. on th 21st, thunderstorm.

On the 22d, 4-inches. On the 23d, 3-inches. On the 24th, 2-inches.

The Court: What was that you said about the 24th?

Mr. Frosh: That is the snow, sleet or ice on the ground at 7:00 o'clock a.m. in inches.

The Court: Thank you.

Mr. O'Donnell: Your Honor, may I talk to Mr. Frosh for a moment?

The Court: Yes.

[Counsel conferred briefly at counsel table.]

Mr. Frosh: Your Honor, may I also tell the ladies and gentlemen of the jury, that on the 21st there was .66 precipitation and total water equivalent in inches, and on the 22d there was .03 total water equivalent in inches. And
370 when I said for the 21st of December "thunderstorm" that was inadvertent. Thunderstorm is one of the identifying marks here. Counsel corrects me and that means "traces of snow" rather than thunderstorm.

If the Court please, counsel and I have agreed that the average life expectancy of a person 57-years-of-age would be 18.23 years. And this is from the Actuarial Society of America Mortality and Life Expectancy Table.

Would the Court indulge me just for a second?

The Court: Yes, certainly.

Mr. Frosh: May we ask that the hospital records, both from Sibley and the Washington Hospital Center, be admitted in evidence as plaintiffs' exhibits 8 and 9?

Mr. Cashman: I would like to take a look at them, Mr. Frosh.

Will you indulge us, Your Honor?

The Court: Yes, certainly.

Mr. Cashman: Your Honor, May we approach the bench?

The Court: Yes.

[At the bench]

Mr. Cashman: Your Honor, with respect to the hospital records, the District of Columbia has no objection to that portion which is recorded in the regular course of business and which has dates of entry and treatment and the
371 rest. However, the District does object to that portion of the hospital records that contains the diagnoses by the doctors and by the medical personnel whom we have no opportunity to cross examine.

The Court: Do they contain diagnoses by doctors that are not available for cross examination?

Mr. Cashman: I believe they do, Your Honor. They seem to me to contain diagnoses.

Mr. Frosh: I haven't gone over them that closely. If they do I would agree that ought to be omitted.

Mr. Cashman: Yes, that is a regular rule.

The Court: I believe it is the New York Life Insurance Case.

Mr. O'Donnell: We would have no objection, Your Honor, if the medical records were received in evidence subject to their not being taken to the jury room. Mr. Frosh could read those portions that are proper to the jury. But if the whole record went in I am afraid the diagnoses and prognoses might be brought to their attention.

The Court: Is there something in there particularly you want to put in? If so, you could read it in, if you wish.

Mr. Frosh: Frankly, Your Honor, the portion that I am primarily interested in I got in with the doctors, either Baker or Hand, with respect to the staph infection, but I thought that, out of an abundance of caution, if there
372 were any questions raised as to the treatment, the injury and the staph——

Mr. Cashman: Your Honor, perhaps we could streamline it this way: The defense, at least the District, has no objection to that portion of the hospital records, either at the Washington Hospital Center or at Sibley Memorial Hospital, that does not contain diagnoses by doctors whom we have not had a chance to cross examine.

The Court: You will have to pick that out and tell him what that is.

Mr. Frosh: Maybe we can simplify it this way: I have no intention of reading anything to the jury. If the jury should want to see the hospital records I would have no objection to your removing from the records anything you feel is offensive before it goes into the jury room.

Mr. Cashman: That is sufficient for us.

The Court: Then they are to be admitted with the understanding that if the jury want to see the records they

are not to have the diognoses of any physicians who didn't testify. And if the jury asks for these records those portions are to be removed. Is that correct?

Mr. Cashman: That is the stipulation, Your Honor.

Mr. Frosh: Would Your Honor tell them that or should I say anything, or do we need to say anything?

The Court: You don't expect to hand it to them to
373 read. I would just wait until when and if the problem arises. They may never ask to see them.

Mr. Frosh: Very well, Your Honor.

Mr. O'Donnell: Your Honor, I don't think we are going to have any trouble on the bills. We are at the stage of having a meeting of the minds. I believe that would be the close of Mr. Frosh's case and there would be the motions at that time.

The Court: Do you want to look over your bills, is that it?

Mr. O'Donnell: Yes. I think we are pretty well through there, but we are wondering about the jury.

The Court: Well, what is your suggestion about the jury?

Mr. O'Donnell: Rather than keep them here and letting them get mad at the attorneys and blaming the Judge for not letting them go out——

The Court: Well, it is time to recess anyway.

Mr. Frosh: If they are going to make directed verdict motions it will take possibly longer than 10-minutes, and I thought we could adjourn after than and we could start our case fresh in the morning.

The Court: All right, I could do that. How long are you going to take?

374 Mr. Cashman: Your Honor, I have said consistently and I am still going to say that my case will not exceed a half a day provided I have to go on.

The Court: You know, there are a lot of things about the building that are not clear to me.

Mr. O'Donnell: I think that is one of the things not clear to the jury.

The Court: It seems to me that if you had something in here on it that it would be helpful. For instance, some-

body talked about a green area. Somebody talked about a box and trees being in it. And somebody talked about all concrete. Of course, it is all concrete now. I think I have a pretty good idea where Mr. Krill was but it is just the location of these other things.

Mr. O'Donnell: Your Honor, I think we have got testimony that where I have got those little marks there [indicating] that was grass in the area owned by the District. I don't think here there is any doubt. And here, these marks, that is a sidewalk 6-feet wide. And next to that is where I have got slashes, and that is a treebox space. The Officer who was here gave us some approximation on distances. I might suggest to the Court that we could have the plan here, and the plan shows it is 123-feet from the front of our store to the back of our store.

The Court: I understood Mr. Krill to say that
375 where he was was 20-feet from this downspout. He was then west of this downspout. He wasn't east of the downspout.

Mr. O'Donnell: No.

Mr. Frosh: That is right, he was west of it.

Mr. O'Donnell: He also testified the ground is downhill east to west and downhill north to south, so actually the water is running, if there is any water—and there is no evidence of this—that it is running down the sidewalk and doesn't run uphill.

Mr. Frosh: It doesn't have to. You have got what Oliver Wendell Holmes called an inarticulate major premise. You think that because he says 20-feet from the downspout that he is 20-feet west of the downspout, and that doesn't have to be. He can be 20-feet from the downspout and be in a different direction.

Mr. O'Donnell: If that were to be true, he had walked approximately 100-feet in snow, 3 or 4-inches of snow and ice.

The Court: I put that down here as he said it.

Mr. O'Donnell: But he said he never walked any further than 30-feet from our door, and he repeated that and repeated it; and 30 from 100 is 70-feet.

The Court: Are the telephone poles the same?

Mr. O'Donnell: Yes, the telephone pole is still
376 there 18-feet from the corner.

The Court: Is it 18-feet up?

Mr. O'Donnell: It is 18-feet up from the end of the building.

The Court: He said that where he fell was near a telephone pole and that it was 20-feet from the downspout.

Mr. Frosh: And the telephone pole is 18-feet from the downspout.

Mr. O'Donnell: He was 18-feet uphill.

Mr. Frosh: He was fairly close.

Mr. O'Donnell: But this is irreconcilable, Your Honor, with his direct testimony.

The Court: Don't you upset my glasses there [indicating].

Mr. O'Donnell: He never went any further than 30-feet, and if it is true what Mr. Frosh has stated to the Court, I would suggest that—at one time it is my recollection 10 to 12-feet—he would have been on the grassy area. He wouldn't even have been on the sidewalk because that grassy area is 18-feet wide. And I might also suggest to the Court that this would be the strongest case of contributory negligence I have ever seen.

The Court: Was there any concrete there at the time of this accident that your people had put in?

377 Mr. O'Donnell: No, Your Honor.

The Court: I didn't think there was. But there is a whole lot there now.

Mr. O'Donnell: Yes, and I don't know who put that concrete in, whether the District covered over their public space—

Mr. Cashman: No.

The Court: We will recess and come back.

[In open court]

The Court: Members of the jury, there is a little work that needs to be done out of the presence of the jury, so

I am going to excuse you for the day; and you are to return tomorrow at the usual time.

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439

John P. Spaulding

called as a witness by Defendant Peoples Drug Store, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. O'Donnell:

Q. Officer, state your full name and your assignment, please. A. John P. Spaulding, No. 8 Precinct.

Q. That is with the Metropolitan Police Department? A. Yes.

Q. Were you so assigned on December 24, 1962? A. Yes.

Q. To the No. 8 Precinct? A. Yes.

Q. Now, Officer Spaulding, did you have an occasion on that day, sometime after 5 o'clock in the afternoon, to go to the intersection of Wisconsin Avenue and Albermarle Street, N.W.? A. Yes.

Q. What were the circumstances surrounding your going to that intersection on that day? A. I was informed by the patrol signal system operator that an injury on public space had occurred at that intersection, and about 9:45 p.m. I went to that intersection.

Q. And this was as a result of or direction of someone at the Precinct, is that correct? A. Yes, that is correct.

Q. Did you go to that intersection and review it? A. Yes, I did.

Q. And what portion of that intersection were you to inspect? A. The southeast corner.

Q. Of Albermarle Street and Wisconsin? A. Of Albemarle and Wisconsin.

Q. Now, Officer Spaulding, do you recognize this map with Wisconsin Avenue going north and Albemarle Street going east here? A. Yes, I do.

441

Q. And is this corner the southeast corner, the corner that you referred to already? A. Yes.

Q. Now, is there a Peoples Drug Store on that corner? A. Yes, there is.

Q. And does Peoples Drug Store or did it at that time have a door that faced cater-corner directly across the intersection to Sears? A. Yes.

Q. Now, when you arrived at the southeast corner, did you look down and inspect for ice and snow? A. Yes, I got out of the car and inspected the corner.

Q. Now, would you tell the ladies and gentlemen of the jury what the condition was on this corner? A. Directly in front of the Peoples Drug Store's front door the area was clear of snow and ice down to the pavement.

The Court: Down to where?

The Witness: Down to the pavement of the sidewalk.
442

Mr. O'Donnell: Your Honor, may the witness come down to this diagram?

The Court: Yes, he may, but he is going to have to keep his voice up in order for the reporter to get what he says.

(At the board:)

By Mr. O'Donnell:

Q. Now, Officer, so that the Judge can hear you clearly, do you understand this diagram, was there at that time a grassy area in approximately this location? A. Yes, there was.

Q. And was there a sidewalk going down the street? A. Yes.

Q. And was there a tree box space going down the street? A. Yes, that is correct.

Q. And was there an area of sidewalk in this approximate area as indicated on this diagram? A. Yes, that is correct.

Q. Would you tell us, using this as a guide, as the front door, the area that was, as you described it, cleared down to the sidewalk? A. An area extending from the front door

to the sidewalk, to the tree box space, on both sides in this manner.

443 Q. Now, would you make some curlicues of this particular area that you have just described? Would you come over on this side by me, and I will take your pointer. Make some ovals. A. Over the entire area?

Q. Yes, and assuming that this is the entire front door, designate the boundary lines where the ice and snow had been cleared to the sidewalk. A. (Marking board.)

Q. At this time I am going to put curlicues over the line. Is that correct, Officer? A. Yes, that is correct.

Mr. O'Donnell: I have no further questions.

(The witness returned to the stand.)

Cross-Examination

By Mr. Frosh:

Q. Officer Spaulding, you made a report, did you not, at 11:59 p.m. on the night of the 24th of December as to what you saw when you went to that corner, did you not? A. Yes.

Q. Did you bring a copy of that report with you? A. No, I didn't.

Q. Now, do you recall the report that you made? 444 A. Yes.

Q. When is the last time that you read it? A. About a month ago.

Q. And on the report that you made, if I were to read it to you, would you be able to tell me whether it is an accurate reflection of that report?

Mr. Cashman: Your Honor please, I have a copy of that police report. I will make it available to whoever wants it.

Mr. O'Donnell: Your Honor, might I see it? I have never read it.

The Court: Yes, you may. All of you can see it.

By Mr. Frosh:

Q. Now, in that report you said that the area of the fall was examined at 9:45 p.m., December 24, 1962, by Private John P. Spaulding, No. 8 Precinct, who reports no snow or ice observed, but states that he observed some snow and ice in the tree box space on the adjoining curbs at the above location. Was that correct? A. Yes, that is correct.

Q. Now, when you observed this corner, did you have occasion to observe whether there was ice and snow
445 in this area? A. Yes, I believe there was.

Q. And did you have occasion to observe whether there was ice and snow extending all the way down the Peoples Drug Store building? A. Yes, packed ice and snow.

Q. And would you describe that packed ice and snow, as you saw it? A. One to two inches of packed ice and snow.

Q. Did it extend all the way down eastward on Albemarle Street to the end of the Peoples Drug Store building? A. Yes.

Q. Now, had you been on duty on December 21st, 22d and 23d, were you on duty during those days?

Mr. Cushman: Your Honor, may we approach the bench?

The Court: Yes.

(At the bench:)

Mr. Cashman: Your Honor, this is well without the scope of the direct examination. He was only asked with respect, on direct examination, with respect to his investigation on on the 24th of December. Now, this officer was available to the plaintiff from the very beginning, was announced as being one of our possible witnesses whom we would call.

We submitted the police report and the question, as I
446 say, is without the scope of the examination. I object to it for that reason.

The Court: I am afraid I have to sustain the objection.

Mr. Frosh: All right.

(End of bench conference.)

By Mr. Frosh:

Q. Officer Spaulding, did you have occasion to observe whether there was ice and snow on the Wisconsin Avenue sidewalk immediately adjacent to the Peoples Drug Store?

A. Yes.

Q. And would you tell us what you observed there? A. There was some ice and snow along Wisconsin Avenue adjacent to Peoples Drug Store.

Q. Can you tell us how long—you have seen this map here that Mr. O'Donnell placed on the board—can you tell us how long the area was from the front door of Peoples Drug Store down to the rear of the building? A. I don't know the exact length of that.

Q. Could you approximate that for us? A. Approximately 115 feet.

Q. And were you familiar with this grassy plot that 447 was located here on the map? A. Yes.

Q. Were you familiar with the building, Peoples Drug Store? A. Yes.

Q. Can you describe that building for us? A. Well, the Peoples Drug Store sits on the corner as indicated on the map.

Mr. O'Donnell: I object, your Honor. This is way outside the scope of the direct examination.

Mr. Frosh: All right, Your Honor, I won't pursue that. We have no further questions.

Oh, would the Court indulge me just a moment?

We have no further questions.

Mr. Cushman: Just a couple of questions, if I may, Your Honor.

Cross-Examination

By Mr. Cushman:

Q. As I understand, Officer, you went out on the 24th of December, 1962, to investigate the scene? A. Yes.

Q. What time did you go out? A. 9:45 p.m.

Q. 9:45 p.m. Did you ascertain the time when Mr.
448 Krill was injured? A. It was reported as 5 p.m. or
thereabouts.

Q. 5 p.m. on the same day? A. Yes, on the same day.

Q. May I ask you whether you were directed to the south-
east corner, is that what you testified? A. Yes.

Q. The southeast corner of Albemarle and Wisconsin
Avenue? A. Yes, that is correct.

Mr. Cashman: Thank you. I have no further questions,
Your Honor.

Mr. Frosh: I have nothing further.

Mr. O'Donnell: May the witness be excused?

The Court: Have you any further questions?

Mr. Frosh: No, I have not, Your Honor.

The Court: You are excused.

(Witness excused.)

Mr. O'Donnell: May I call Mr. McKenna?

The Court: Yes.

Thereupon—

Gerald S. McKenna

called as a witness by the Defendant Peoples Drug Store,
being first duly sworn, was examined and testified as fol-
lows:

449 Direct Examination

By Mr. O'Donnell:

Q. Mr. McKenna, state your full name and professional
address. A. My name is Gerald S. McKenna and my ad-
dress is 1249 Congress Court, N. W.

Q. And was your professional address previously—you
have moved recently, is that correct? A. That is correct,
the first of the year.

Q. And your former address was where? A. 1179 New
Hampshire Avenue, N. W.

Q. What is your occupation? A. I am a registered pro-
fessional engineer.

Q. Would you tell the ladies and gentlemen of the jury your educational background, please? A. I am a graduate of Catholic University of America, Class of 1949, with a degree of Bachelor of Civil Engineering.

Q. Are you licensed to practice, if that is what it is called, civil engineering in the District of Columbia? A. Yes, I am.

Q. And what does civil engineering encompass, what do you do? A. Well, we do a number of things, but
450 chiefly our practice is concerned with land surveying, topographic surveying, structural design, site planning. I'd say that generally covers it.

Mr. O'Donnell: Your Honor, I offer Mr. McKenna to the Court as an expert witness in civil engineering.

Mr. Frosh: I have no objection.

Ms. Cashman: No objection.

The Court: Very well, the Court recognizes Mr. McKenna as an expert in that field.

By Mr. O'Donnell:

Q. Mr. McKenna, at my request, did Locraft Engineers make a survey of the southeast corner of Wisconsin Avenue and Albemarle Street, N.E., looking toward distances and toward topography? A. Yes. Northwest, I think you mean.

Q. Northwest. A. That is right.

Q. Would you tell us what was done by your office in this connection? A. I received a call from you at your office asking that such a survey be made and I agreed to do it. I went to the site, looked at it, based on the general outline you had given me. I then went to the Dis-
451 trict Building where the land records and the records for control, vertical-horizontal control, where such surveys are kept, and obtained the necessary information to make that survey. I then instructed the chief of party, survey party, in what I wanted him to do and asked him to go to the field and make this survey.

Q. And did you take the information received from him and draw a plat? A. Right. The field notes were reduced to a map and I took that map and then went to the site and

verified that the map was accurate in all respects and then sent it on to you.

Mr. O'Donnell: Your Honor, may this document be marked as Defendant Peoples Exhibit for identification No. 5?

The Court: Yes.

(Survey map of Wisconsin and Albemarle was marked Defendant Peoples Exhibit No. 5 for identification.)

By Mr. O'Donnell: -

Q. Mr. McKenna, I will show you at this time what has been marked Defendant Peoples Exhibit for identification No. 5, is this the plat that was prepared by your office of this particular southeast corner of Wisconsin Avenue 452 and Albemarle Street, N.W.? A. Yes, it is.

Mr. O'Donnell: Your Honor, I wonder if I could have Mr. McKenna stand at the board?

The Court: Yes, he may.

(At the board:)

Mr. O'Donnell: If Mr. Cashman has no objection, I wonder if I could put this on his side of the drawing?

Mr. Cashman: I knew he was going to do that, Your Honor. No, I have no objection.

Mr. O'Donnell: Your Honor, we have put this upside down because we have been using up as north.

By Mr. O'Donnell:

Q. Now, Mr. McKenna, when was this plat made? A. In October of 1964.

The Court: Mr. McKenna, will you keep your voice up?

The Witness: Surely, October of 1964.

By Mr. O'Donnell.

Q. Were you familiar with this area at that time and for years prior thereto? A. Generally speaking.

Q. Had your organization done work on other
453 buildings in this particular block? A. Yes.

Q. Was this the condition, this plat that was drawn in October 1964, was this the condition that was to be found there on December 24, 1962, to the best of your knowledge? A. The best of my knowledge, yes.

Q. Now, Mr. McKenna, I want to ask you a couple of basic questions about this diagram, and with the pointer would you point out where the front door of the Peoples Drug Store was? A. (Pointing.)

Q. And that is that slant line? A. The chamfered line.

Q. Now, could you tell us approximately or even more definitely the distance from the front door to the end of the building on Albemarle Street? A. It is about 100 feet. The length of the site is 103.6 feet.

Q. When you say the length of the site, you mean from this point here to this point? A. Right.

Q. And from the door it is approximately 100 feet to the end of the building? A. I'd say maybe 97 feet would be more like it.

454 Q. Now, Mr. McKenna, do you recall whether there was at that time, December of 1964, concrete in this particular area I am pointing to, the sidewalk space? A. Yes.

Q. And is it fair to assume that all this area up was public space?

Mr. Frosh: Objection, Your Honor. I don't think the witness can assume.

By Mr. O'Donnell:

Q. Do you know of your own knowledge whether this space in here was public space? A. Yes, that is public space.

Q. And you checked that, yourself? A. Yes.

Q. Now, could you tell us the distance from the front door at this point to the curb line? A. Twenty-eight feet.

The Court: Mr. O'Donnell, you asked him if all of this is public space, but the record doesn't show what "all of this" is. I wonder if you could ask that question in some

way so that the record will indicate what "all of this" means.

By Mr. O'Donnell:

Q. Mr. McKenna, north of the building line, that
455 you identified for us, of the building located at the
corner of Wisconsin Avenue and Albemarle Street,
I am referring you specifically to this particular area, is it
your testimony that north of this line, the building line,
that the sidewalk and the grass and earth area, the sidewalk
that is north of the grass and earth area, as well as the
tree box space, is public space? A. Yes.

Mr. O'Donnell: Does that clear it, Your Honor?

The Court: Yes.

Mr. O'Donnell: Thank you, Your Honor.

By Mr. O'Donnell:

Q. Would you tell us the distance from the front door
to the grassy area? A. Twenty-one feet.

Q. Now, I notice that you have blocks all through the
middle and right portion of this diagram, are these blocks
equivalent to the street blocks that were there at that time
in December of 1962? A. Those represent the joints in the
concrete pavement.

Q. As they were in December of 1962? A. As best I can
recall, it is definitely the way they were in October
456 1964 and I'd say yes, that is the way they were in 1962.

Q. What is the width of one of these blocks? Are
these square? A. They are square and they are three feet
by three feet.

Q. Could you tell us the distance between this point
which abuts the store next to the grassy area and where the
normal sidewalk is located? A. It is eighteen feet.

Q. Could you tell us the distance from where the side-
walk becomes two blocks in width, to the end of the build-
ing line? A. Seventy-three and a half feet.

Q. Now, I notice that you designated in the tree box
space an elm tree, is that correct? A. Yes.

Q. And a sign, is that correct? A. Yes.

Q. And a power pole with street light at this area here?
A. Yes.

Q. And another elm tree? A. Yes.

457 Q. Now, Mr. McKenna, is the distance from this point on the east side of the building to the north side of the grassy area, northeast side, the same distance as the eighteen feet you mentioned earlier? A. Yes.

Q. On the west side of this grassy area? A. Yes.

Q. Now, at my request, did you also make a topographical survey of this area? A. Yes. Generally speaking, the whole thing is considered a topographical survey.

Q. Well, did you measure elevations? A. Right, yes, we did.

Q. Would you tell the ladies and gentlemen of the jury how you measure elevations and about some of the figures that are located here? A. Elevations are measured with an instrument called a level and with another instrument called a rod which is nothing more than just a ruler.

Q. Well, I notice here, for example, you have 389 and you have a line that goes through the diagram. What does 389 mean? A. 389 represents the height of the ground,
458 where the line 389 is shown there, above sea level.

Q. Now, I notice at—let's take this point here which is adjacent to the end of the building line and this says 386.79. What does that mean in lay terms? A. That is the elevation on top of the curb at that point.

Q. Would it be fair to say it is 386 feet and approximately 8 inches or 9 inches? A. Above sea level, that is right.

Q. So that is 386 and 9 inches? A. Right.

Q. And there is another figure up here, this isn't in the gutter line, is it? A. No.

Q. This is flush with the sidewalk? A. It is the top of the curb and generally on that level.

Q. What is the elevation at this point? A. 390.48, which is 390 feet and 5 and $\frac{3}{4}$ inches.

Q. So there is a difference in elevation from this point to this point of 4 feet, is that correct? A. Roughly, yes.

Q. And approximately how many feet going to the
459 east? A. About 100, a little bit more than 100 feet,
about 110.

Q. So it drops 4 feet in approximately 100 feet distance?
A. That is right.

Q. Now, can you tell from this diagram, as well as from
your personal observation, whether the area near the prop-
erty line of this building is higher than the area of the
sidewalk? A. If you are speaking of the area of the side-
walk perpendicular, immediately opposite, yes, it is higher.

Q. Yes. Well, let's take a couple of examples. Now, at
this particular point, it is 388 feet above sea level, is that
correct? A. That is right.

Q. Now, at this point here, approximately what would
the elevation be? A. It is 387 and a half.

Q. So that would be approximately a 6 inch drop? A.
Right.

Q. From this area to this area? A. Yes.

460 Q. Is that correct? A. Yes.

Q. And all of these numbers through here indi-
cate the distance above sea level for the entire area, isn't
that correct? A. That is right.

Q. Now, what is the natural flow of water or any sub-
stance, fluid, through this area, which would be the normal
way for it to flow as a result of gravity? A. It would flow,
generally speaking, perpendicular to the contour or since the
contour is curved, in a radial direction to the contour, and
of course downhill from higher to lower.

Q. So would it be fair to say that the water in this area—
well, you show us, say there was snow here, there is water
and it started to flow this way, is that correct? A. Yes.

Q. Would you show the approximate way it would go? A.
From this point it would flow, generally speaking, like this.

Q. And would that be relatively true of all the other
areas as you go down the street? A. Yes.

Q. I just want to make a quick review, Mr. Mc-
461 Kenna, in case I haven't gone over these things. What
is the width of the curb? A. The curb is 8 inches
wide.

Q. What is the area of the tree box space? A. The measurement across the tree box space, including the curb, is 4 feet, so the earth would be 3 feet.

Q. Am I correct that the width of the sidewalk here is 6 feet? A. Yes.

Q. And that the width of this grass and earth area up here was approximately 18 feet? A. Eighteen feet, yes.

Q. So the distance from the property line here to the street would be 28 feet? A. Yes.

Q. And the distance from this door to this point here was how many feet, again? A. Twenty-one feet.

Mr. O'Donnell: I have no further questions.

Mr. Frosh: Would you stay right there for a moment.

Cross-Examination

By Mr. Frosh:

Q. I believe Mr. O'Donnell asked you if you had
462 prepared this in part from your own familiarity and recollection of the neighborhood, is that correct? A. No, I hadn't prepared this from any recollection of the neighborhood, this was all the result of actual measurement in the field, but I am familiar with the neighborhood.

Q. And does this drawing represent, as Mr. O'Donnell said, the exact condition of Peoples Drug Store in 1962, or does it reflect your recollection of the area at that time? A. My recollection at that time.

Q. In other words, you did not examine any records to determine exactly what all of these measurements were? A. No records specifically, no.

Q. So that this representation is based on recollection rather than on any records that might have been available? A. This is based on actual measurements made in October of 1964.

Q. Now, I notice at the end of Peoples Drug Store building here, you have a notation that says "5 inch downspout." A. Uh huh.

Q. Would you tell us if this is a downspout that you discovered in 1964 when you were there? A. Yes.

Q. Now, do you know of your own knowledge where
463 this downspout was located in December of 1962?

A. I can say with virtual certainty that it was right there where it is now.

Q. And it was in the same place that it is now? A. Uh huh.

Q. Has this building been remodeled at all? A. It has just recently been remodeled.

Q. And where is that downspout now? A. I don't know.

Q. Now, you testified that insofar as measurements were concerned, that the contour line showed 387.9 as the elevation above sea level as this point and 386.9 as the elevation above sea level at this point that would be a difference of approximately 1 foot, is that correct? A. I don't recall testifying that.

The Court: Keep your voice up, please.

Mr. O'Donnell: I think he said he didn't recall testifying that way, Your Honor.

By Mr. Frosh:

Q. Well, let me see if we are correct. The elevation at this point is 387 point— A. It is 388 even.

Q. And the elevation at this point is 386.9 or 387
464 is the contour A. The heavy contour line represents 387.

Q. So there is a difference of only 1 foot between these two points? A. That is right.

Q. Now, insofar as the contours running from south to north are concerned, you indicate that the elevation at this point is 387, 386.82 as against 386.93, is that correct? A. 386.82 and —

Q. 386.93 there? A. At that point.

Q. Now, that is about a tenth of a foot, is that correct? A. 83 to 92, yes.

Q. Now, when you described the flow of water, you said

that it flowed in a radial direction depending upon the contour line, is that correct? A. Yes.

Q. And a radial direction doesn't imply just one direction, it implies a radial type, a flow direction, isn't that correct? A. No. Radial is a single direction, when I say radial, I mean in a line between a point on a curve and the radius point of that curve and the prolongation of such a line.

Q. Now, would I be correct in assuming from your
465 testimony that water, if any were to flow out of the downspout, would follow the contour line in its direction? A. No.

Q. In which way would it flow? A. Well, it would flow normal to the contour.

Q. It would flow normal to the contour? A. Or radial to the contour, which is the same thing except normal implies a straight line contour and radial implies a curved contour.

Q. Now, you have on this map, identified at this point which I am going to mark with a larger circle, you have a power pole, is that correct? A. Yes, that is right.

Q. And that power pole was there in December of 1962, was it not? A. I would say that it was, from my recollection yes.

Q. And you have the drain spout, which I am going to mark with another circle, as being at that location, is that correct? A. Yes, that is right.

Q. Would you tell us the distance between the downspout and the pole? A. I will scale it, if I may.

466 Q. Survey. A. 30 feet.

The Court: How much?

The Witness: 30 feet.

By Mr. Frosh:

Q. Now, in that area between the power pole and the downspout, would you mark with a circle a point that would be 20 feet from the downspout and mark it exactly to scale?

A. Circle it?

Q. Yes, please. A. (Marking a circle.)

Q. And this point that you have marked on this map is a point that is exactly 20 feet from the downspout, is that correct? A. Uh huh.

Q. And the distance, would you tell us, between this point that you have marked and the edge of the sidewalk? A. It is a foot and a half, a little bit less than a foot and a half, maybe a foot and five inches.

Mr. Frosh: I have no further questions.

Cross-Examination

By Mr. Cashman:

Q. Mr. McKenna, just a few questions. Is this line
467 here to which I am pointing with my finger, is that actually the front door of Peoples Drug Store? A. Yes, it was.

Q. You say it has recently been— A. There has been some remodeling done.

Q. But that was done within the near recent past, wasn't it? A. Yes, since this work.

Q. Right. And this drawing was composed in October, you say, of 1964? A. Yes.

Q. And it is your recollection, is it not, that this drawing represents Peoples Drug Store and the environs as they were in December of 1962? A. Yes.

Q. With respect to the door of Peoples Drug Store here, as it is on the Albemarle Street side rather than the Wisconsin Street side, would you kindly tell me, please, how far it is from that door to the end of the building? A. It would be 96 feet in round figures, plus or minus a foot.

Q. Ninety-six feet, thank you. Now, would you tell me
468 what percentage of grade exists from the front entrance of the drug store down the street to the end of the building? A. Along the building line?

Q. Yes. Well, along the sidewalk line is what I am mainly concerned with.

The Court: That is on Albemarle Street?

Mr. Cashman: That is on Albemarle, yes, Your Honor.

The Witness: I can't tell you exactly what it is here because we didn't measure the elevation here. From here down, we have it indicated as 4% plus or minus, it varies between 3 and 4%.

By Mr. Cashman:

Q. I see. A 4% grade, roughly it drops 4 feet over the distance of 100 feet? A. That is right.

Q. Now, you made reference to a tree box space. Just to clarify for the sake of the ladies and gentlemen of the jury and for the Court, what is a tree box space? A. It is an unpaved area between the curb and sidewalk.

Q. Do you know its use? A. It is a planter, it is a place which trees are planted and in addition to that, there usually are No Parking signs or parking meters or street lights or things of that nature.

469 Q. Or poles or whatever it may be? A. Right.

Q. That is the space between the curb and the sidewalk? A. That is right.

Q. Now, adjacent to the tree box space on the north side of the street, Albemarle Street—pardon me, on the south side of the street, is the sidewalk, is it not? A. Yes.

Q. And the sidewalk is how wide along Albemarle Street along this, what has been referred to as a grassy plot, along this area here, how wide is that sidewalk? A. Six feet.

Q. Six feet. Now, this grassy area here, do you know what the technical term for that is, Mr. McKenna? A. The Highway Department calls it a parking.

Q. Calls it public parking? A. Right.

Q. And it is that area that exists between the building line, is it not, and the sidewalk? A. That is right.

Q. So this area here, adjacent to the door, is paved public parking, is it not? A. Yes, that is right.

470 Mr. McKenna, just so that we won't be confused, you indicated that the width of these squares that you have here is 3 feet, as is the length, they are 3 feet square? A. That is right.

Q. They are the ordinary concrete paving block, are they not? A. That is right.

Q. And the lines that are represented here are the quarter or so inch lines that are made between the paving blocks to account for the differences in temperature and expansion and contraction that are normally associated with the vagaries of weather, is that right? A. That is right.

Q. And so if we counted these paving blocks, we would be counting by threes, is that right? A. That is right.

Q. Is that not also true if we were counting paving blocks along this way? A. That is right.

Mr. Cashman: I have no further questions.

Mr. Frosh: I have none.

Redirect Examination

By Mr. O'Donnell:

Q. As an engineer, how would you classify a 4%
471 drop, are there classifications of drops or slanting down, would it be steep or shallow? A. No, it is a normal fall, it is not very steep.

Q. Four feet in 100 feet? A. Four feet in 100, it is a comfortable grade to walk for a person.

But it is downhill? A. It is definitely downhill; it will get the water out, if that is what you mean.

Mr. O'Donnell: I have no further questions.

The Court: Mr. McKenna, you spoke of a power pole on the south side of Albemarle Street, did you?

The Witness: Yes.

The Court: Would you give the approximate distance from the entrance to the store to that power pole?

The Witness: Straight line distance measured directly?

The Court: Well, you tell us how you give it.

The Witness: I will measure it parallel with the street, will that be all right?

The Court: Yes.

The Witness: Eighty-five feet. That is measured along the curb from a point opposite the entrance to a point opposite the power pole.

472 The Court: That is the entrance on Albemarle?

The Witness: It is the entrance really at the intersection of the lines of Wisconsin Avenue and Albemarle Street, that is where the entrance was.

The Court: I see, very well.

I take it now that everyone is agreeable to Mr. McKenna being excused?

Mr. O'Donnell: Yes, Your Honor.

Mr. Cashman: Yes, Your Honor.

Mr. Frosh: Yes, Your Honor.

The Court: You are excused.

Mr. O'Donnell: Your Honor, with the Court's permission, I would like to offer in evidence certain exhibits that have already been marked for identification on my behalf.

The Court: All right.

Mr. O'Donnell: I would like at this time to offer—well, I see that my Exhibit No. 1 for identification has been admitted on behalf of the plaintiff, so it is not necessary under those circumstances.

At this time, I would like to offer into evidence the employment records which have been marked as Defendant's

Exhibit for identification No. 2, these are the records
473 of Mr. Krill at the Secret Service which I subpoenaed.

The Court: Very well, admitted, Defendant's Exhibit No. 2.

(Defendant Peoples' Exhibit No. 2 was received in evidence.)

Mr. O'Donnell: The Defendant's Exhibit No. 3 for identification are the sick and annual leave records used by Mr. Krill from 1960 to March 26, 1966, which I also subpoenaed, Your Honor.

The Court: Very well, Defendant's Exhibit 3 is admitted.

Mr. O'Donnell: I might say, Your Honor, that attached to this exhibit is a piece of paper which was prepared by the Secret Service and I ask that this be a part of this exhibit with the records. This is how it was brought to me.

Mr. Frosh: No objection.

Mr. Cashman: I have no objection, Your Honor.
The Court: Very well, admitted.

(Defendant Peoples' Exhibit No. 3, with attached paper, was received in evidence.)

Mr. O'Donnell: Would you indulge me for a moment?
The Court: Yes, certainly.

(Mr. O'Donnell conferred with Mr. Frosh.)

474 Mr. O'Donnell: Your Honor, I also subpoenaed from the Secret Service all Mr. Krill's medical records or any reports that had been received by them since 1962 and I was informed by the agent who responded to my subpoena that there are no medical records, they have received nothing at the Secret Service.

At this time, I would offer into evidence Defendant's Exhibit for identification No. 4, which is a medical report signed by Dr. Radice, dated April 24, 1964, and sent to Mr. Frosh.

Mr. Frosh: No objection.

The Court: Admitted.

(Defendant Peoples' Exhibit No. 4 was received in evidence.)

Mr. O'Donnell: I at this time offer into evidence my exhibit for identification No. 5, that is the plat made by Locraft Engineers at my request that Mr. McKenna testified to just now.

The Court: Very well, admitted.

(Defendant People's Exhibit No. 5 was received in evidence.)

Mr. O'Donnell: I at this time, Your Honor, offer into evidence a time table which is, as I understand, an official document of the District of Columbia.

Mr. Cashman: That is correct, Your Honor, it is.

475 Mr. O'Donnell: It is a time table for lighting and extinguishing public street and alley lamps in the District of Columbia, showing the number of hours burning

each night and the month and year, eastern standard time.

The Court: Have you shown that to Mr. Frosh?

Mr. O'Donnell: I believe he has seen it.

Mr. Frosh: No (looking at exhibit).

Your Honor, I think this is irrelevant and immaterial. This is a time table for lighting and extinguishing public street and alley lamps in the District of Columbia, showing the number of hours each night and month of the year and the headings are apparently directions as to all lamps to be lighted by, whatever hour, begin to extinguish at, and I don't know that this is at all material to our inquiry here.

Mr. O'Donnell: This is a public record and as a public record, there is a presumption that—(pause)—this will show when the lights were turned on in the District of Columbia on December 24, 1962.

The Court: Would you show that to Mr. Frosh, where it shows that.

Mr. Frosh: I don't believe it shows that, Your Honor, that is where we part. It says all lights to be lighted by, it doesn't say all lights were lit by, and I agree that
476 this is the direction to the Department as to when they are to light the lights, but it is not a record of the District of Columbia that shows that the lights were in fact lighted at the times said in that schedule.

Mr. O'Donnell: Your Honor, this is a public document, there is a presumption of the validity of the document, a presumption that what is called for in the document has been carried out.

The Court: Have you given it a number?

Mr. O'Donnell: No, I haven't marked it for identification. It would be my exhibit No. 6, Your Honor.

Mr. Frosh: Maybe I can simplify it, Your Honor. I have no objections to its being admitted as a document showing when the instructions are to light the lights.

The Court: Very well, it is admitted.

(D. C. time table for lighting street lights was marked Defendant Peoples' Exhibit No. 6 for identification and received in evidence.)

Mr. O'Donnell: May I read it, Your Honor?

The Court: Yes, you may.

Mr. O'Donnell: Ladies and gentlemen of the jury, this is a time table prepared by the District of Columbia which indicates on December 24, 1962, that all lamps to be
477 lighted by, in the District of Columbia, and the lamps would mean street lamps, and it says here: 4:51.

At this time, Your Honor, I would like to have marked for identification as Defendant Peoples' Exhibit No. 7, a lease agreement dated August 17, 1949, between Olga F. Donnelly and the defendant Peoples, and there is an extension of this lease dated April 15, 1954, and I would at this time offer it into evidence.

Mr. Frosh: Your Honor, we object on the grounds that it is (A) hearsay, (B) incompetent, (C) irrelevant, and finally, immaterial.

The Court: Well, now, do you object on the ground that it hasn't been proven?

Mr. Frosh: I am not objecting on the ground that it has to be proven, I am assuming that Mr. O'Donnell could prove that it is in fact the lease, but I say that even assuming that he could, it is not admissible.

The Court: Since you are not objecting to Mr. O'Donnell not having the witness here to identify the lease, you are not questioning that it is what he says it is, I will admit the lease.

Mr. Frosh: Your Honor, I urge also that it is prejudicial and he should not be allowed to read any portions
478 of this lease to the jury because it is not binding as between the plaintiffs and Peoples Drug Store, even though it may be binding insofar as Peoples Drug Store and the——

Mr. O'Donnell: Your Honor, I am going to object to this type of conversation in the presence of the jury, I think it should be at the bench.

The Court: Yes. Very well, I will overrule the objection. May I see the document.

Mr. O'Donnell: Your Honor, I was just going to announce to the Court at this time the Defendant Peoples Drug Store rests.

The Court: Defendant's No. 7 is admitted.

(Lease agreement dated August 17, 1959 and extension dated April 15, 1954, was marked Defendant Peoples' Exhibit No. 7 for identification and received in evidence.)

Mr. Frosh: Your Honor, would you consider having the noon recess now while we consider whether we have any rebuttal testimony? I doubt that we do and I think we are going to rest.

The Court: Yes. Would it give you time enough if we make it 1 o'clock to reconvene?

Mr. Frosh: Surely.

The Court: Members of the jury, you are now excused for the luncheon period until 1:15.

479 (The jury left the courtroom.)

Mr. O'Donnell: Your Honor, are we going to renew our motions now or would it be more convenient later on?

Mr. Cashman: He doesn't know if he is going to put on rebuttal testimony.

Mr. O'Donnell: Oh, I didn't understand.

The Court: He said he wanted to consider whether or not he would have any rebuttal.

Mr. O'Donnell: I withdraw that, I didn't understand that.

Mr. Frosh: I rather doubt that we will, but I did want to speak to Mr. Camalier.

(The luncheon recess was taken from 11:45 a.m. until 1:15 p.m.)

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513 Mr. Frosh: Your Honor, very simply, I think that the District of Columbia was adequately notified, in conformance with the requirements of the statute, of the claim of Mrs. Krill.

If we are going to strictly construe this statute, it has to indicate the time, location and the place of her injury. As Mr. Cashman has said, this is a different kind of an injury than falling, she wasn't injured when he fell. Her loss of consortium came at a different time and is of a wholly different nature and if they want to strictly construe that statute, it becomes somewhat ludicrous because for us to notify the District when the consortium loss began is completely different and it might extend the time for her notice much beyond the time when he actually fell.

But if the notification by a police officer that he investigated this is sufficient, because all the Districts wants is notice of the happening of the accident, then this letter from Mr. Gates to Mr. Krill and his answer, is sufficient to put them on notice of her claim.

The Court: Well, I think I will leave Mrs. Krill in. It may be that after I have looked into thi point further that I may revise the ruling, but I think for the moment that I will leave Mrs. Krill in.

But I will grant the directed verdict as to the
514 Peoples Drug Store.

Mr. O'Donnel: Thank you, Your Honor.

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AFTERNOON SESSION

(The proceedings resumed at 1:30 p.m.)

The Court's Charge to the Jury

The Court: Members of the Jury, a person who comes into court and makes a complaint is known as the plaintiff and in this case there are two plaintiffs, Mr. Krill and his wife, Mrs. Krill.

The party against whom a complaint is made is known as the defendant and in this case the defendant is the District of Columbia.

The case here is what is commonly called a negligence action. It is without dispute that on December 24, 1962, Mr.

Krill fell down while walking on the south side of Albemarle Street, east of Wisconsin Avenue, N.W., and was injured.

Mr. and Mrs. Krill are each suing for damages. They contend that his fall was due to negligence on the part of the District of Columbia in failing to keep the sidewalk, where he fell, in a reasonably safe condition.

They claim that ice and snow formations on the sidewalk where Mr. Krill fell, were of such a size or shape or location as to constitute a danger aggravated over and above the original general slipperiness caused by weather conditions

and unusual in comparison with general conditions
545 naturally prevalent throughout the City; that the District of Columbia had actual or constructive notice of such danger and a reasonable opportunity to remove or treat such formations so as to make the sidewalk reasonably safe for pedestrian travel, that nevertheless the District failed to do so and that such failure was the proximate cause of the fall of Mr. Krill and his injuries.

What I have just stated is the claim of Mr. and Mrs. Krill. Mr. Krill seeks to recover damages for his injuries for his pain and suffering, for his loss of time from his employment, and for his expenses for medical attention, hospital care, and the like. Mrs. Krill seeks to recover damages for loss of the companionship, society and services of her husband.

The District of Columbia, on the other hand, says that Mr. Krill is not entitled to any damages. Further, the District denies any negligence on its part. It denies the existence, at the place where Mr. Krill fell, of any dangerous or unusual condition over and above the inherent danger that naturally exists in an accumulation of ice and snow due to weather hazards.

The District further says that if the condition alleged by Mr. Krill did exist, the District had no notice of it and no opportunity to do anything about it.

546 It is claimed by the District that, if Mr. Krill suffered injuries and damages as he claims, they were the result of his sole negligence or his contributory negli-

gence in that, so the District claims, Mr. Krill failed to keep a proper lookout, failed to see what was there to be seen, and failed to exercise reasonable care for his own safety in the light of obvious conditions.

What I have just concluded is a statement of the claim or response of the District of Columbia.

It now becomes your duty, Members of the Jury, to determine whether Mr. and Mrs. Krill are entitled to recover damages and, if so, what the amount of the damages should be for each of them.

When a case is tried to a jury, the Court consists of the Judge and the Jury. Each has a separate function and responsibility.

It is the duty of the Judge to preside at the trial, to pass on questions of law as they arise, including the admissibility of offered evidence, and finally at this stage of the proceeding to explain to you the law applicable to the case, and you are bound and obligated to follow the Judge's instructions as to the law.

You are the judges of the facts, you are the
547 fact-finding body of the Court, and you are the exclusive judges of the facts.

When you have determined what the facts are for yourselves, you are then to apply to those facts the law as I shall state it to you and then you deliberate and reach proper verdicts.

In finding the facts, the jury must look solely to the evidence in the case. The evidence in the case consists of the testimony which you have heard from the lips of the witnesses who took the stand here and the exhibits in the case.

Also, you may consider as evidence in the case those inferences which to your mind logically and reasonably arise from the evidence in the case.

Also, I believe that there were stipulations of counsel during the progress of the trial and those stipulations, too, are to be regarded by the jury as evidence.

Now, when this case began, a lawyer for each side made to you what is known as an opening statement. At the con-

clusion of the case, the lawyer for each side made to you a final argument.

You are told that what a lawyer says is not evidence in the case, and what I say to you is not evidence in the case.

The evidence is just what I indicated to you a moment
548 ago, and if the attorneys or if I state that something is in the evidence which, according to your recollection, is not there, then you must be guided by your own independent recollection, and that is because you are the sole judges of the facts.

In performing your duty, you will not allow sympathy or prejudice or emotion of any kind to enter into your deliberations or into your determination of your verdict. You will find the facts calmly and dispassionately, bearing in mind that you are the fact-finding branch of the court.

You will not guess or speculate or conjecture but, as I have said, you must look exclusively to the evidence and those inferences which reasonably and logically arise from the evidence.

You are the judges also of the credibility of the witnesses who appeared here before you. That means that you are to determine what witnesses to believe and the extent to which you believe them.

You are instructed that you are the sole judges of the credibility of the witnesses in this case and of the weight and of the value to be given to their testimony.

In passing upon the credibility of any witness, you have the right to take into consideration the demeanor of the witness on the witness stand, whether the witness im-
549 pressed you as having an accurate memory and recollection, whether the witness impressed you as a truth-telling individual or the contrary.

You may consider the contradictions, if any, in the testimony of a witness and the contradictions between the testimony and what the witness may have said on other occasions.

You may take into consideration the interest, if any, of a witness in the outcome of the case and decide whether or

not that interest colored the testimony of the witness in any way.

If you believe that any witness has wilfully testified falsely as to any material matter about which the witness could not reasonably have been mistaken, then it is within your discretion to disregard the whole of the testimony of that witness or such part of it as you believe to be untrustworthy. I am not intimating that anyone in this case has wilfully testified falsely, but since it is my obligation to instruct you with regard to all of the law which may be applicable, I mention this matter to you so that you will be guided by the law in case you find that it did happen.

Finally, you may take into consideration all of those human factors shown by the evidence which may affect the desire of capability of a witness to give accurate testimony.

550 We now come to what is known as the burden of proof. The party in a case who asserts the affirmative of an issue has the burden of proof.

At the outset, the jury is told that the burden of proof is on Mr. and Mrs. Krill. Their burden is to establish by the evidence the essential allegations of their complaint.

To be entitled to verdicts in their favor, they must prove by a fair preponderance of the evidence:

First, that the ice and snow formations, which caused him to fall, were of such size or shape or location as to constitute a danger aggraated over and above the original general slipperiness caused by weather conditions and unusual in comparison with general conditions naturally prevalent throughout the City;

Second, Mr. and Mrs. Krill must prove that the District of Columbia had actual or constructive notice of such danger and a reasonable opportunity to remove or treat such formations so as to make the sidewalk reasonably safe for pedestrian travel;

Third, Mr. and Mrs. Krill must prove that, nevertheless, the District failed to do so; and

Fourth, Mr. and Mrs. Krill must prove that such
551 failure proximately caused the fall and injuries of
Mr. Krill.

I have said that, to be entitled to recover, Mr. and Mrs. Krill must prove all these essential allegations of their complaint by a fair preponderance of the evidence.

What do we mean by a fair preponderance of the evidence? A fair preponderance of the evidence means the greater weight of the evidence, or evidence which is more convincing to the jury than the evidence in opposition.

If you believe that the testimony on any essential point is evenly divided or evenly balanced so that it weighs no more on one side than on the other, then your finding as to that point must be against the party who has the burden of proof.

A party succeeds in carrying the burden of proof on an issue of fact if the evidence favoring that party's side of the question is more convincing to you than that tending to support the contrary side, and if it causes the jurors to believe that on that issue the probability of truth favors that party.

There is one point as to which the District of Columbia has the burden of proof. The District of Columbia has the burden of proof as to its claim that Mr. Krill was contributorily negligent.

In connection with the claim of contributory negligence, you are told this: The District of Columbia,
552 although denying any negligence on its part, takes the position that, even if the jury should find that the District of Columbia was negligent, still the plaintiff, Mr. Krill, is not entitled to prevail in this suit because, so the District of Columbia claims, negligence or carelessness on Mr. Krill's part contributed to the accident and the injuries he sustained. In other words, the District of Columbia says that Mr. Krill was contributorily negligent.

You are not bound to accept or to decide in conformity with the testimony of a number of witnesses which does

not produce conviction in your mind, as against the declaration of a lesser number of witnesses or other evidence which does appeal to your mind with more convincing force. You are not to decide an issue by the simple process of counting the number of witnesses who testified on the opposing sides. The final test is not in the relative number of witnesses but in the relative convincing force of the evidence which may be offered in support of or against any particular proposition.

Regardless of who produces evidence, a party is entitled to the same benefit from evidence that favors him, when produced by his adversary, as when produced by himself.

As I have said, the suit is what is called a negligence action. Negligence may be defined in different ways. 553 Sometimes negligence is referred to as the breach of a duty. Negligence is never presumed, but must be proved.

Mr. Krill, the plaintiff here, had a duty to exercise ordinary care for his own safety on the day of his accident.

Ordinary care is that care which a reasonably prudent man would have exercised at the time and place and under like conditions.

It was the duty of Mr. Krill to see and observe whatever a reasonably prudent man, at that time and place, would have observed under like circumstances. If Mr. Krill had a choice of ways to proceed after he left Peoples Drug Store, it was his duty to take the way which the ordinarily prudent man would have taken under similar circumstances.

If you find that Mr. Krill did exercise ordinary care for his own safety, then he would not be negligent and would be entitled to a verdict at your hands, provided you find he is otherwise entitled to recover.

But if you should find that Mr. Krill failed to exercise due care for his own safety, then he would be negligent, and if such negligence was the sole cause or a contributing cause of his fall and injuries, then he would not be entitled to recover and neither would his wife.

I have spoken to you of the duty of Mr. Krill. Now,
554 I shall speak of the duty of the District of Columbia.

You are instructed that the defendant, the District of Columbia, has the duty to exercise reasonable care to maintain the sidewalks in a reasonably safe condition for use by a pedestrian.

The District Government, as a municipal corporation, is charged with the duty of supervising the sidewalks of Washington and keeping them in a condition reasonably safe for convenient use and reasonably fit for convenient use by pedestrians who are using them.

But the District is not under an absolute obligation to respond for every accident a person may suffer on its sidewalks. It is simply bound to practice due care and diligence in the exercise of its powers and in the application of its resources toward the object named. If due care is thus exercised and, notwithstanding, an accident occurs and somebody is injured, it is the misfortune of the victim and the authorities are not liable.

If its duty has been fully performed in regard to any particular place and that place has been put in good condition, safe against all accidents that could be reasonably foreseen and provided for, and afterwards it becomes dangerous and then an accident happens, the rule is that
555 the District Government is not responsible for the injuries that result unless it had timely notice of the dangerous condition of the place so that it could have an opportunity to remedy the situation. This notice is either actual or constructive.

Constructive notice means that if a place on a sidewalk remains in a dangerous condition so long that the District authorities could not help knowing that fact, through the exercise of ordinary care and diligence, and did not know it because they failed to exercise proper diligence, then the law imputes notices to them; in other words, they would have notice in contemplation of law and that is what is known as constructive notice.

No certain duration of a dangerous condition operates of itself as notice. The law does not require impossibilities of any person, natural or artificial, and it is impossible that all parts of all streets and sidewalks should be under constant inspection. Consequently, it could not be maintained that, at the instant a dangerous condition arises, the authorities are charged with notice and held liable therefore if they do not put it instantly in repair.

Every such case must be determined by its peculiar circumstances. The District authorities would not be responsible for damages arising from the dangerous condition unless actual notice was brought to them of the condition or unless the place remained in an unsafe condition so long that they ought to have known of it, if they had exercised reasonable and ordinary care.

From what I have already said, you understand that this is a suit for damages for negligence. Mr. Krill says that the District of Columbia was negligent and the District says that Mr. Krill, alone, was negligent or that he was contributorily negligent. So, I shall further explain what is meant by negligence, I explained it heretofore as meaning the breach of a duty, but as I said, it may be defined in different ways.

Negligence may be said to be the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do. It is the failure to use ordinary care. Negligence is not an absolute term, but a relative one. By this I mean that in deciding whether there was negligence in a given case, the conduct in question must be considered by the jury in the light of all the surrounding circumstances as shown by the evidence.

This rule rests upon the self-evident fact that a reasonably prudent person will react differently to different circumstances. These circumstances enter into and are a part of the conduct in question. An act negligent under one set of circumstances might not be so under another.

Therefore, to arrive at a fair standard, we ask:

What conduct might reasonably be expected of a person of ordinary prudence under the same circumstances? Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence.

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct. Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs.

Now, we come to a definition of contributory negligence. Contributory negligence is negligence on the part of a person injured which, combining in some degree with the negligence of another, helps in proximately causing the injury of which the injured person complains. One who is guilty of contributory negligence may not recover from another for the injury suffered.

Contributory negligence, as it has been defined, connotes negligence on the part of both the plaintiff, Mr. Krill, and the defendant, the District of Columbia, combining to
558 proximately cause the injury. Not only is plaintiff precluded from recovering if he is guilty of contributory negligence, but he may not recover if the injury was the proximate result of his sole negligence.

Mr. Krill says the District of Columbia was negligent and that such negligence was the proximate cause of the injuries suffered by him.

Now, what is meant by proximate cause? The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result one would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury. In simple, everyday language, the proximate cause of an injury is some act or omission that causes or

contributes to cause an injury and without which the injury would not have occurred.

Since the District of Columbia has interposed a defense of contributory negligence, and contributory negligence contemplates negligence on the part of both the plaintiff and the defendant proximately causing the injury, I shall now give an instruction on concurring causes.

The instruction which has been given on proximate cause does not mean that the law seeks and recognizes only
 559 one proximate cause of an injury consisting of only one factor, one act, one element of circumstances or the conduct of only one person. To the contrary, the acts and omissions of two or more parties may work concurrently as the efficient cause of an injury and, in such a case, each of the participating acts or omissions is regarded in law as the proximate cause.

You are instructed as follows: Snow and ice present a peculiar problem in that they may be dangerous in their natural normal state and over many or even all parts of the entire City. A municipality cannot be held liable for that which is not its fault, so it cannot be held liable for injuries due to snow or ice as or just after the snow has fallen or the ice formed and when the City has had no opportunity to correct dangerous conditions thus created, and it cannot be held liable for that which is beyond its power to correct. So, it cannot be held liable for injuries due to the mere slipperiness of snow or ice in its natural state, because it cannot cure such slipperiness on every bit of sidewalk and streets in a large city.

You are told, therefore, that the District of Columbia is not negligent on a mere showing that snow or ice existed in the City. In this variable winter climate of ours, falls of snow, followed by rain or by thawing and then by freezing, and so alternating from day to day, are common. The

560 City is in no way responsible for such conditions.

This general condition all over the City is the work of nature, and cannot be guarded against. But if the City should negligently suffer snow and ice to remain and ac-

accumulate in a particular place until it becomes a dangerous obstruction to pedestrians and thereby a pedestrian is injured, then the City would be liable, and this is the measurement of its liability.

I am now going to read to you a requested instruction which states the law, which one of the parties asked me to give you and it reads substantially the same as the one that I have just read to you, but this isn't meant for duplication: The Jury is further instructed that where snow or ice has remained on the streets and sidewalks for a period of time and in certain places has been pushed or trampled or otherwise formed into an obstruction or a danger apart from its original natural danger state, and in an unusual shape or size, it is not different from any other obstruction or danger.

If the District of Columbia has actual notice of such danger, or if such danger is so notorious or so long-continued that the District authorities are charged with constructive notice of it, then the District of Columbia is liable for injuries resulting from it.

Now, Members of the Jury, the question of whether
561 there was a dangerously aggravated condition at the particular place where Mr. Krill fell is among the questions of fact which the jury is to decide. Likewise, the jury is to decide the question of whether such condition, if it did exist, had existed for a period of time sufficient to give rise to a constructive notice to the District authorities and an opportunity for them to correct it.

The jury is told that the District of Columbia is not an insurer of the safety of travelers upon its sidewalks or public space. It is charged only with the duty of supervising the public ways of Washington and exercising reasonable care to keep the sidewalks in a reasonably safe condition.

The jury is instructed that there is no presumption or inference of negligence on the part of the defendant District of Columbia by reason of the mere happening of an accident on public space controlled by it; but that, on the contrary, the legal presumption is that ordinary care was

exercised by the District and that the burden of proof is on Mr. Krill to show, by a fair preponderance of the evidence, that the defendant was negligent and that such negligence was the proximate cause of the injury suffered by him.

The jury is instructed that in determining whether or not reasonable care was used by the City as to one particular sidewalk after a snowfall, it is proper to
562 consider the number of miles of streets and sidewalks in the District, the amount of snow required to be moved, the manpower and equipment available, and the means and methods used.

You may further consider the relative importance to the public safety of devoting greater effort to clearing the sidewalk in question as against using the men and equipment needed for such purpose of snow removal at other places.

Where a snowfall occurs and is followed by temperatures that permit alternate thawing and freezing so that a condition of slush remains and is frozen by a drop in the temperature, the time charged against constructive notice upon the City would be from the date of the freeze and not the date of the snowfall.

The burden is upon Mr. Krill to prove that a sufficient length of time existed, prior to the time of his fall, for the City under all the circumstances to have notice of the existence of the particular formations of ice and snow alleged by him and to have remedied these conditions.

It is not necessary for the jury to find that the District of Columbia had actual notice of the existence of a dangerous condition in order to be liable to a person injured thereby, if the District had constructive notice thereof and
563 an opportunity to remedy the condition. And if an accumulation of snow and ice on sidewalks, such as to constitute a dangerous obstruction, is allowed to remain an unreasonable length of time, then the District of Columbia would have notice of the condition as a matter of law and that is what is known as constructive notice.

Now, whether in this case there was a dangerous condition as Mr. Krill claims and, if so, whether the District had actual or constructive notice thereof and an opportunity to correct it, are all questions of fact to be resolved by the jury from the evidence.

You are instructed that before the plaintiffs can recover in this case, they must show that the defect alleged was dangerous and that the District of Columbia had either actual or constructive notice thereof; that is to say, either the District of Columbia through its proper agents was aware of such defect in time to have remedied it or that the defect was of such character and so apparent that the District of Columbia, in the exercise of reasonable care and supervision over the public space, would have discovered the defect in time to have remedied it.

You are instructed that you are not justified in finding negligence based upon conjecture or speculation. So, where
564 two equally justifiable inferences may be drawn by the jury from the facts proven, one of which is consistent with the negligence of the defendant and the other of which is consistent with lack of negligence of the defendant, you are instructed that, in that event, your verdict would be for the District of Columbia. This is because, under such circumstances, the plaintiffs would have failed to carry their burden of proof.

The jury is instructed that while weather records are recognized as probative evidence of weather conditions in the locality where and when an accident occurred, such evidence, standing alone, cannot establish the indispensable actual or constructive notice of the existence of a specific condition, nor the duration of such condition, nor whether or not such condition was dangerous at the time of Mr. Krill's fall.

To entitle the plaintiffs, Mr. and Mrs. Krill, to verdicts in their favor, the jury must first find that they have established by a fair preponderance of the evidence each and all of the following:

First, that the ice and snow formations, which Mr. Krill claims caused him to fall, were of such size or shape or location as to constitute a danger aggravated over and above the original general slipperiness caused by weather conditions and unusual
 565 in comparison with general conditions naturally prevalent throughout the City.

Second, that the District of Columbia had actual or constructive notice of such danger and a reasonable opportunity to remove or treat such formations so as to make the sidewalk reasonably safe for pedestrian travel.

Third, that nevertheless the District failed to do so.

And fourth, that such failure proximately caused the fall of Mr. Krill and his injuries.

Should the jury find that the plaintiffs have failed to prove any one or more of these four essential elements of their claims, then your verdict would be for the District of Columbia.

On the other hand, if the jury finds that each and all of the four essential allegations of their claim have been shown by the plaintiffs, by a preponderance of the evidence, then the plaintiffs, Mr. and Mrs. Krill, would be entitled to your verdicts, unless the District of Columbia proves, by a fair preponderance of the evidence, that Mr. Krill was himself negligent and that his negligence contributed in some degree to proximately causing his fall and injuries, in which
 566 event the District of Columbia would be entitled to your verdict.

You are to keep in mind that contributory negligence is not presumed, but must be proved by the District of Columbia by a preponderance of the evidence.

Should the jury find that all the essential allegations of Mr. Krill's claim have been established and that he is entitled to a verdict in his favor, then his wife, Mrs. Krill, would also be entitled to a verdict in her favor. But should

the jury find that Mr. Krill is not entitled to recover, either because of failure to prove all the essential allegations of his claim or because of contributory negligence on his part, then his wife, Mrs. Krill, would not be entitled to recover on her claim. This is because the claims of Mr. and Mrs. Krill are grounded on the same alleged negligence, although the damages Mr. Krill seeks are different from those sought by his wife, Mrs. Krill.

As to Mr. Krill's claim, your verdict may be for him or for the District of Columbia, depending upon what you find the facts to be. Likewise, as to Mrs. Krill's claim, your verdict may be for her or for the District of Columbia.

If you find that Mr. Krill is entitled to recover, you will consider, in fixing the amount of the award to him, the following elements of damage. The reasonable value,
567 not exceeding the cost to him, of the medical attention received, including examinations, tests, and care by physicians and surgeons, services of nurses, attendants, hospital accommodations and care, and ambulance service, and any additional medications, treatment or services which were reasonably required and actually given in his treatment, and the reasonable value of the time lost by Mr. Krill since his injury, wherein he has been unable to pursue his usual occupation. In determining this amount, you should take into consideration the evidence of Mr. Krill's earning capacity, his actual earnings and the manner in which he normally occupied his time before the injury, and find the amount he was reasonably certain to have earned in the time lost, had he not been disabled, in such sum, in addition to the elements of damage heretofore mentioned, as will reasonably and adequately compensate Mr. Krill for any loss of earning power occasioned by the injury in question which you find from the evidence Mr. Krill is reasonably certain to suffer in the future.

In determining this amount, you may take into consideration what Mr. Krill's health and physical ability and earning capacity were before the accident and what they are now, the

nature and extent of his injuries and disabilities, whether they are reasonably certain to be permanent in character or, if not permanent, the extent of their duration, all to the end of determining the effect of his injuries upon his future earning capacity and the present value of the loss sustained.

If you find, under the Court's instructions, that Mr. Krill is entitled to recover, you should take into consideration not only the elements of damage heretofore mentioned, but you will award him also such sum as will reasonably and adequately compensate him for the pain, suffering, discomfort and mental anguish suffered by him as a proximate result of the injury in question.

You will also take into consideration, in addition to the above elements of damage, such pain, suffering, discomfort and mental anguish, if any, that you may find from the evidence Mr. Krill is reasonably certain to suffer in the future as a proximate result of the negligence of the defendant.

According to the table of mortality, the expectancy of life of one aged 57 years is 18 years; to be precise, 18.23 years. This fact, of which the Court takes judicial notice, is now in evidence to be considered by you in fixing damages, if you find that Mr. Krill is entitled to a verdict. However, this one factor of evidence is not by law controlling but should be considered in connection with all the other evidence bearing on the same issue, such as that pertaining to the health, habits and activities of the person whose life expectancy is in question.

Now, Members of the Jury, I have mentioned a number of elements or things you are to consider in fixing the award to Mr. Krill in case you find he is entitled to a verdict. Nevertheless, an award to Mr. Krill should be in one lump sum. Mr. Krill has the burden of proof with respect to the items of his damage.

In addition to the damages claimed by Mr. Krill, his wife, Mrs. Krill, is seeking damages for loss of consortium. Con-

sortium embraces within its meaning not only the husbands material services, but also includes love, affection, companionship and sexual relations. A wife is entitled to her husband's services, society and companionship. If you find in this case that Mr. Krill sustained personal injuries which had an adverse effect upon the wife's rights in this regard, the wife may recover damages from the party whose negligence caused the injury.

In estimating the amount which would fairly and reasonably compensate the wife for such loss to her, you are to consider the facts in this case in the light of your own experiences and to the satisfaction of your own consciences.

An award to Mrs. Krill should be in one lump sum,
570 in case you find verdicts for the Krills. Mrs. Krill has the burden of proof in regard to her damages.

The first thing that you are to do when you get to the jury room is to elect your foreman, and your foreman will give each of you an opportunity to express your views. Upon your return to the courtroom, your foreman will state your verdicts. However, each of you may be asked to state your individual verdicts and you should be prepared to do so in case you are called upon.

Now, when you have completed your deliberations and have arrived at your verdicts and you return to the courtroom, the clerk will ask you whether you find for the plaintiff, Mr. Krill, or for the defendant, the District of Columbia. If you say you find for the District of Columbia, no further question will be asked in respect of Mr. Krill. But if you say you find for Mr. Krill, the clerk will then ask in what amount?

Then the same routine will be followed as to Mrs. Krill; that is to say, the clerk will ask whether you find for Mrs. Krill or for the defendant, the District of Columbia. If you say you find for the District, no further question will be put to you concerning Mrs. Krill, but if you answer that you find for Mrs. Krill, then the clerk will inquire in what amount?

Are there any objections or requests?

571 Mr. Cashman: May we approach the bench, Your Honor?

The Court: Yes.

(At the bench:)

Mr. Cashman: Your Honor, at this time just for the sake of the record, I would like to reiterate my exception to Your Honor's denial of my requested Instruction No. 3 on contributory negligence as a matter of law. And I might suggest this to the Court, has the Court informed the jury that their decision has to be unanimous?

The Court: I am going to tell them that. I usually ask for these objections, and so forth.

Mr. Cashman: I see, because I knew they were a new jury.

The Court: I have a few words to say to them.

Mr. Cashman: Fine, Your Honor.

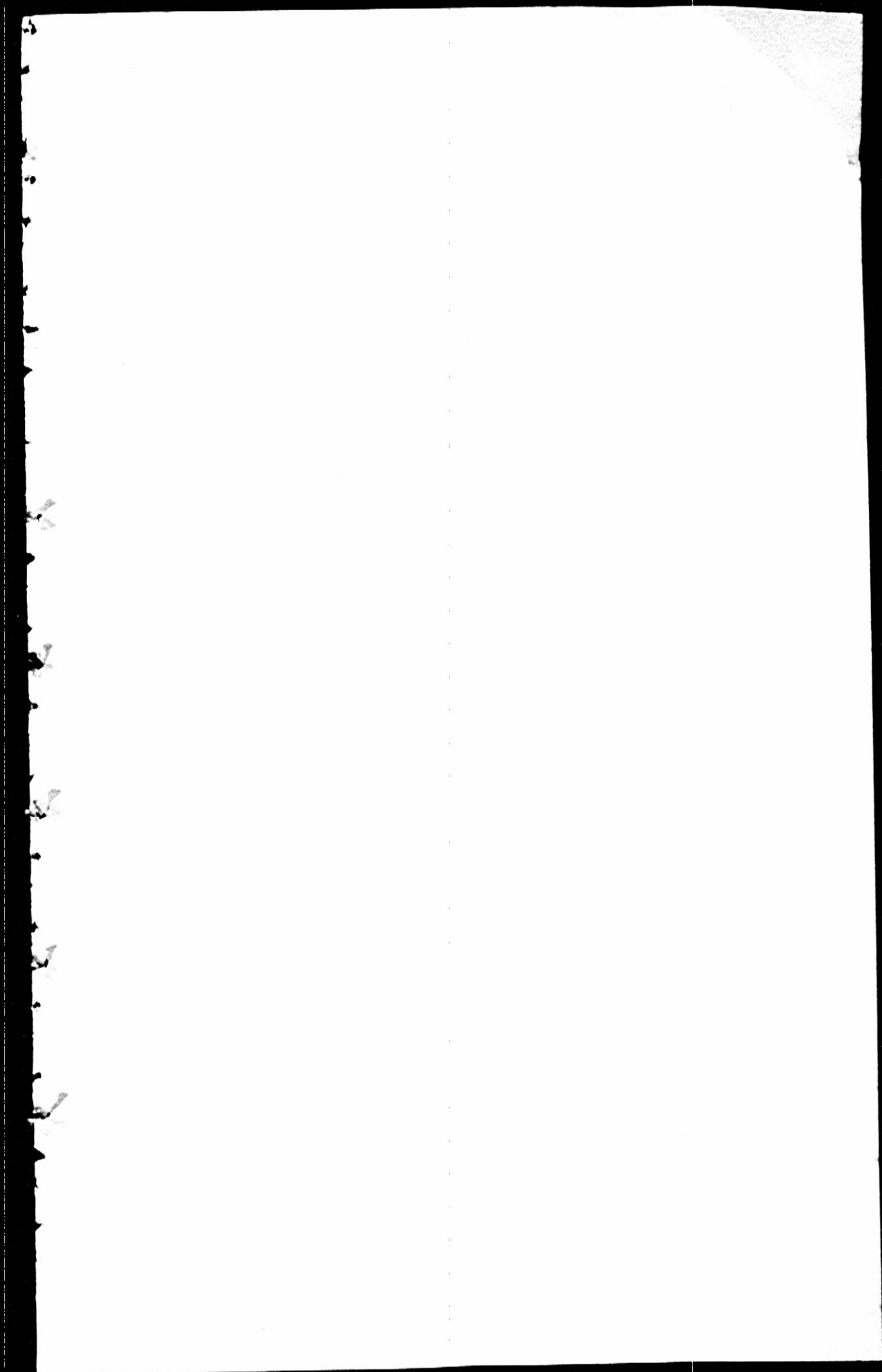
Mr. Frosh: For the record, the plaintiff objects to the instruction that tells the jury that if Mr. Krill had a choice of ways, he must have used the way of ordinary safety. It is our contention there was no evidence of a safe way.

Secondly, we object to the instruction that says that if the conditions on that sidewalk were reasonably safe and became unsafe, the District of Columbia must have received reasonable notice of the change from safe to unsafe
572 conditions, because we again contend there was no evidence the sidewalk was ever made safe.

Thirdly, we object to the instruction on concurrent causes, since it is our position that there were no causes other than the icy condition.

And lastly, we request the instruction on the snow law.

The Court: This concurrent causes had to do with the explanation of the claim of contributory negligence, you see.



160 E

SUPPLEMENTAL JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,342

JACKSON N. KRILL, and MAE MORGAN'S KRILL, *Appellants*

v.

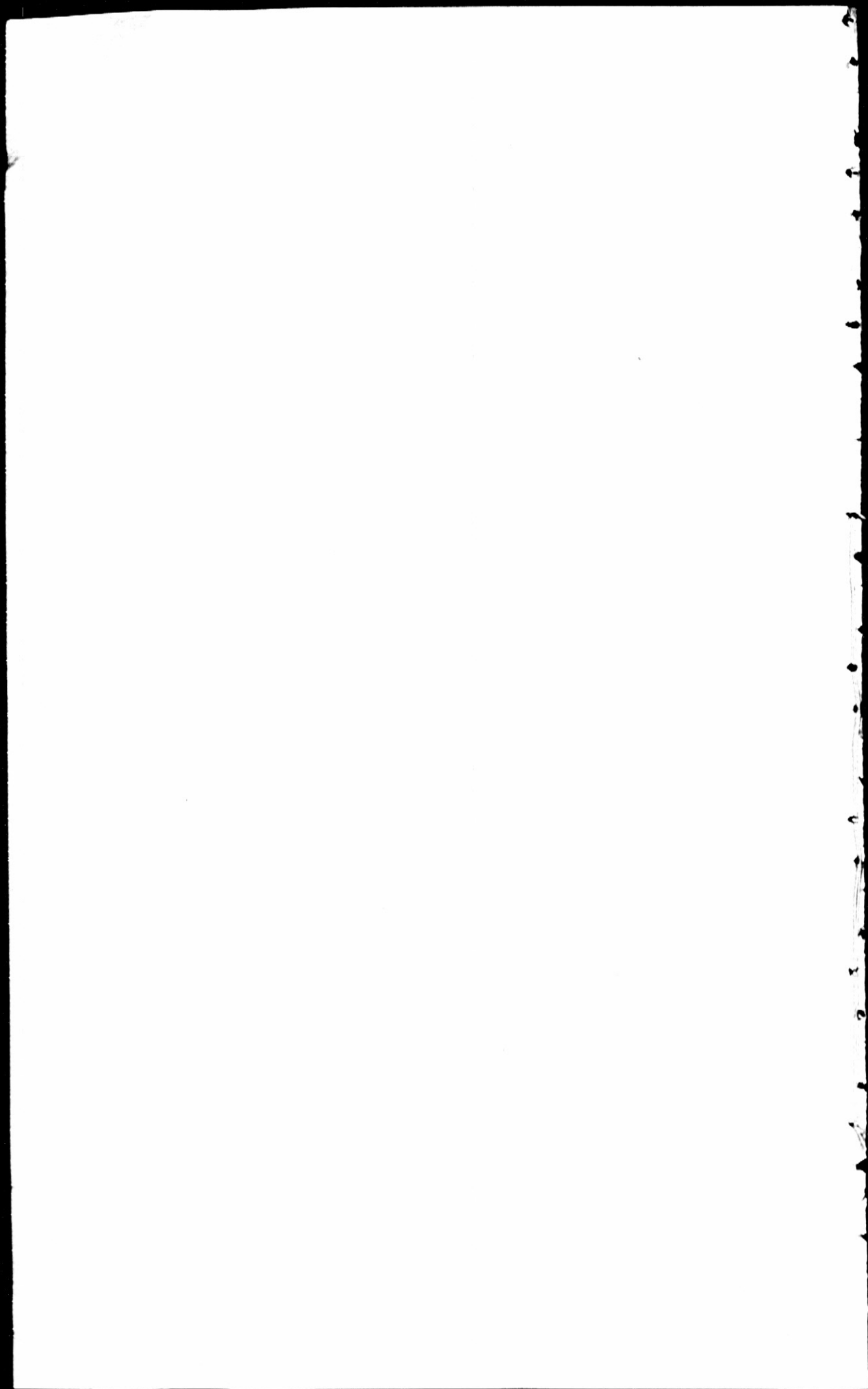
DISTRICT OF COLUMBIA, and PEOPLES DRUG STORES, INC.,
Appellees

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 25 1966

Nathan J. Paulson
CLERK



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,342

JACKSON N. KRILL, and MAE MORGANS KRILL, *Appellants*

v.

DISTRICT OF COLUMBIA, and PEOPLES DRUG STORES, INC.,
Appellees

Appeal from the United States District Court for the
District of Columbia

SUPPLEMENTAL JOINT APPENDIX

Docket Entries

1963

Jul 11—Deposit for cost by

Jul 11—Complaint, appearance, Jury Demand—filed

Jul 11—Summons, copies (2) and copies (2) of Complaint issued—Both ser 7/16/63

Aug 5—Answer of deft #1 to complaint; c/m 8/5/63; appearance of Chester H. Gray and James M. Cashman—filed

Aug 23—Answer of deft. #2 to complaint. c/m 8-22-63; appearance of Gallagher & Thompson—filed

Aug 23—Calendared (n)

Aug 23—Notice by deft. #2 to take deposition of plttf. #1, c/m 8-22-63—filed

Aug 23—Motion of deft. #2 for security for costs, P&A, c/m 8-22-63, MC 8-23-63—filed

Sep 24—Order for security for costs, \$100.00 cash or \$250.00 undertaking within 20 days, or complaint shall be dismissed. (N)—Tamm, J.

Oct 4—Deposit by plttfs \$100.00 security for costs, per order.

Oct 4—Notice of deft #2 to take deposition of plttf #1; c/m 9/30/62—filed

1964

Jan 2—Deposition of Jackson N. Krill 11/1/63. (\$45.80)—filed

Mar 25—Called—Pretrial Examiner

Jun 10—Certificate of readiness by plttfs; c/m 6/9/64—filed

1965

Dec 21—Pretrial Proceedings—Assistant Pretrial Examiner

1966

Feb 4—Copy of letter re: witnesses for defendant #2—filed

Apr 1—Jury and two alternates sworn; trial begun; respited until Apr. 4, 1966. (Rep: M. A. Deeds)—Matthews, J.

Apr 4—Trial resumed; same jury and alternates; respited until April 5, 1966. (Rep: M. A. Deeds)—Matthews, J.

Apr 5—Trial resumed; same jury and alternates; respited until April 6, 1966. (Rep: M. A. Deeds)—Matthews, J.

Apr 6—Trial resumed; same jury and alternates; oral motion of deft. #2 for a directed verdict argued and granted; respited until April 7, 1966. (Rep: M. A. Deeds)—Matthews, J.

Apr 6—Verdict and Judgment for deft., Peoples Drug Stores, Inc. against pltffs., by direction of the Court (N)—Matthews, J.

Apr 7—Trial resumed; same jury and alternates; alternate jurors discharged; Verdict for the deft., District of Columbia against the pltffs. (Rep: M. A. Deeds)—Matthews, J.

Apr 7—Verdict and Judgment for the deft., District of Columbia, against the pltffs. (N)—Matthews, J.

Apr 7—Note from jury foreman—filed

Apr 7—Instructions of pltf. and deft. #1—filed

- Apr 25—Notice of Appeal by pltffs. from orders of April 6th and April 7th, 1966. Deposit: \$5:00 by Camalier. Copies mailed to James Cashman, Ass't. Corporation Counsel and John Jude O'Donnell—filed
- Apr 28—Stipulation of counsel re: exhibits numbered 2 & 3 by deft #2—filed
- Apr 28—Exhibits #2, 3, 4, 6 & 7 by deft #2—filed
- Apr 29—Exhibit #5 of defendant—filed
- May 18—Motion of pltfs for extension of time to file transcript of record on appeal; c/m 5/17/66—filed
- May 18—Order extending time to file record on appeal to July 22, 1966. (N)—McGarraghy, J.
- July 19—Motion of appellants for extension of time within which to file transcript; c/m 7/18/66—filed
- July 19—Transcript of trial, Vol. I, pages 1-85, 4/1/66; Vol. II, pages 86-253, 4/4/66; Vol. III, pages 254-421, 4/5/66. (Attorney's copy) (Reporter Margaret A. Deeds)—filed
- July 19—Consent order extending time for filing transcript to August 8, 1966. (N)—Curran, J.
- July 20—Transcript of trial; Vol. I, pages 1-85, 4/1/66. (Reporter Margaret A. Deeds) (Court's copy)—filed
- July 20—Transcript of trial; Vol. II, pages 86-253, 4/4/66. (Reporter Margaret A. Deeds) (Court's copy)—filed
- July 20—Transcript of trial; Vol. III, pages 254-421, 4/5/66. (Reporter Margaret A. Deeds) Court's copy)—filed

(The following proceedings were had out of the presence of the jury.)

THE COURT: Before we begin this morning, I would like to say something now about the Peoples Drug Store being out of the case. I thought that I would simply explain to the jury that the Judge decides all questions of law and they decide all questions of fact, and that the controversy between the Peoples Drug Store and the plaintiffs turns on a question of law and, therefore, that I had disposed of it and that there remains for them the consideration of the case as between the plaintiffs and the District of Columbia, and I wouldn't indicate what the disposition was in any way as to the drug store.

Is that agreeable to you all or do you have some different idea?

MR. FROSH: Your Honor, I had given it some consideration. I don't know what precise point of law Your Honor had decided the directed verdict on Peoples on. If it was on the basis that they were not the owners of the public parking strip, because that separated the sidewalk from their premises, I think it might be helpful if the jury knew that that was the basis.

THE COURT: Well, that isn't the basis, the basis is on the record as made. I just don't think that you
540 have made a sufficient case to go to the jury, that is all.

MR. FROSH: I see.

MR. CASHMAN: Your Honor, for the District of Columbia, I would endorse the Court's method of the departure of Peoples Drug Store from this lawsuit.

If the Court pleases, I have two very brief matters that I would like to take up with the Court prior to the time the jury comes in. One is, Your Honor, my accession yesterday on the record to the plaintiffs' instruction on the matter of consortium. As you know, I said that I did

not think the cause for consortium had a proper place in this lawsuit all along.

THE COURT: I didn't know you made any concession, I don't remember any you made; what is it you think you made?

MR. CASHMAN: It was to the instruction, I agreed that the instruction submitted by the plaintiffs was a proper one on consortium.

THE COURT: Oh, yes.

MR. CASHMAN: I would like to say my approval was only as to the form and I would still like to retain my objection to the consortium cause.

THE COURT: Certainly, it didn't occur to me that you thought in any way that you had waived your original position.

MR. CASHMAN: I did not intend to and I just
541 wanted to make it clear, Your Honor, that I did not.

Now, the second matter I have, Your Honor, is one additional instruction with respect to constructive notice in this lawsuit. I have given a copy of this instruction to the counsel for the plaintiff and I would propose it to the Court at this time.

THE COURT: Well, I have one on this.

MR. CASHMAN: Do you, Your Honor? You will cover my instruction?

THE COURT: Oh, yes, I cover this thought.

MR. CASHMAN: Fine, I just wanted to make sure it would be in the instructions to the jury.

Thank you, Your Honor.

MR. FROSH: The Court please, I had one matter I wanted the record to be clear on, too. Yesterday I did not submit to the Court the instruction on the snow law because it was my initial reaction that this applied to Peoples Drug Store and that the provision of that regulation of the District of Columbia, the second section, applied only to public buildings and therefore wasn't appropriate. But it oc-

curred to me after we left yesterday evening that the first section, which applies to the owner of any property, applies to the District of Columbia in this case because they
 542 are the owners of the public parking and that, therefore, it would be appropriate to instruct on the snow law insofar as any person who owns or occupies land adjacent to a sidewalk.

I know that Your Honor determined that the snow law would not be a part of your instructions, but I wanted the record to simply indicate that I did request that, both as to the District.

THE COURT: Certainly. Now, are you all ready for the jury?

MR. FROSH: Yes, I am.

MR. CASHMAN: Ready for the defendant, Your Honor.

THE COURT: All right. Will you bring the jury in.

(The jury resumed their places in the jury box.)

THE COURT: Good morning, Members of the Jury. You may proceed, Mr. Frosh, when you are ready.

MR. FROSH: May it please the Court, Ladies and Gentlemen of the Jury: We have now concluded the testimony in the case of Krill v. the District of Columbia and it is now the function of counsel to attempt to summarize for you and to argue the evidence as we feel, respectively, it has been introduced on the witness stand here today.

THE COURT: Mr. Frosh, I want to interrupt you for one moment, if you will excuse me.

543 Members of the Jury, there is just one matter that I desire to call to your attention. The jury decides questions of fact, while the Judge decides questions of law.

The controversy here between Mr. and Mrs. Krill and the Peoples Drug Stores turned on a question of law and so I have disposed of the case insofar as it concerns the Krills and the Peoples Drug Stores.

You have for your consideration, however, the case insofar as it concerns Mr. and Mrs. Krill and the District of Columbia.

And now, Mr. Frosh, you may go forward.

MR. FROSH: Thank you, Your Honor, I was going to mention that and I am glad that you did.

(Thereupon, closing arguments were made to the jury, which are not made a part of this transcript.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1768-63

JACKSON N. KRILL, *et al.*, Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*, Defendants.

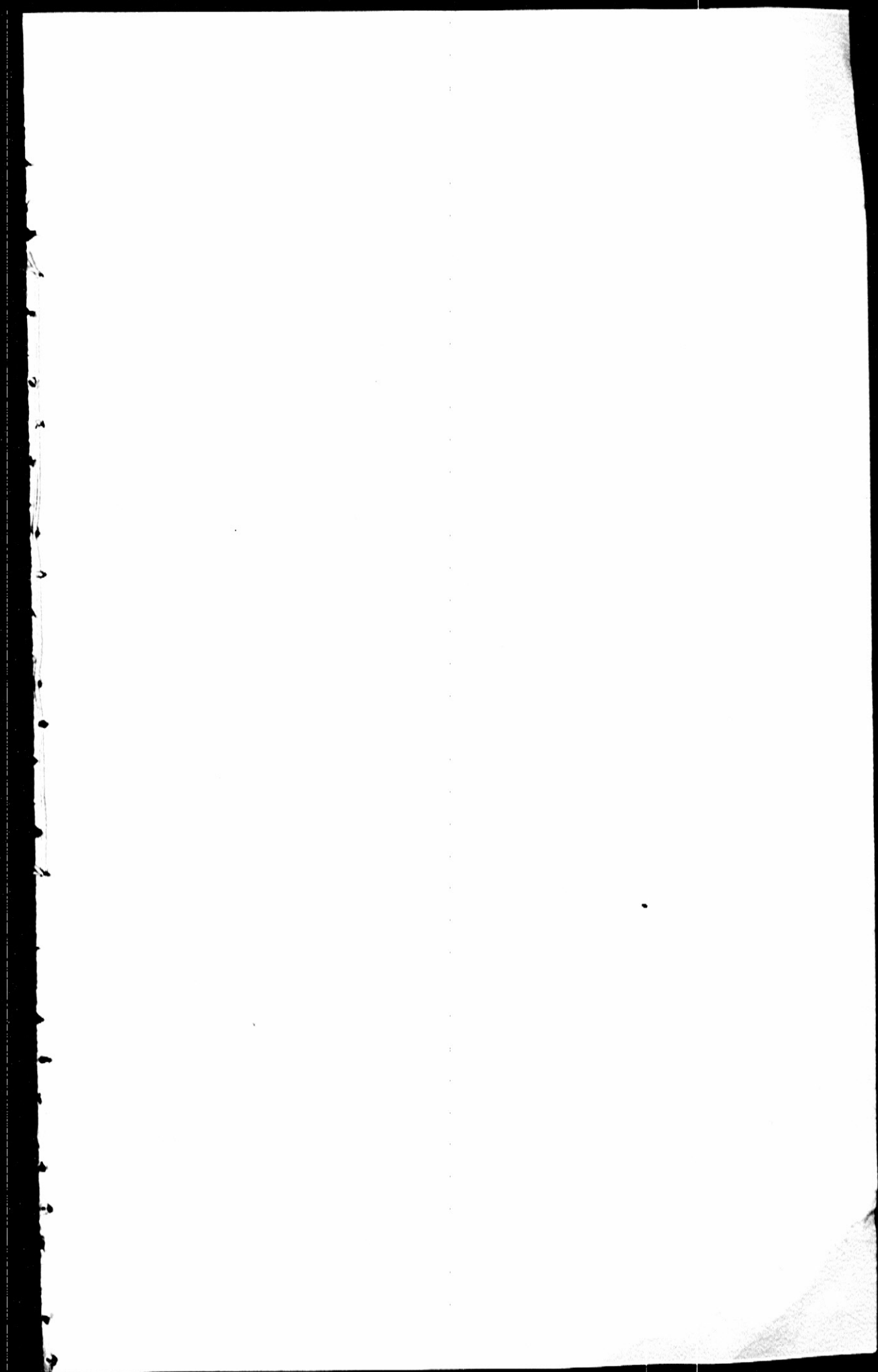
Notice of Appeal

Notice is hereby given this 21st day of April, 1966, that Jackson N. Krill and Mae Morgans Krill appeal from the Order entering Judgment for the Defendant Peoples Drug Store, Inc. entered the 6th day of April, 1966, and from the Order entering Judgment for the Defendant District of Columbia entered the 7th day of April, 1966.

RENAH F. CAMALIER

STANLEY B. FROSH

Attorneys for the Plaintiff



BRIEF FOR APPELLEE DISTRICT OF COLUMBIA

**UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit**

No. 20,342

JACKSON N. KRILL, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA, et al.,

Appellees.

**Appeal From The United States District Court
For The District Of Columbia**

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United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 10 1966

Nathan J. Paulson
CLERK

QUESTION PRESENTED

In the opinion of the appellee District of Columbia the question presented is:

Since this Court has held that enactment of the District of Columbia snow removal law did not alter municipal liability with respect to injuries caused by falls on snow and ice covered streets and sidewalks, did not the trial court properly decline to instruct the jury on the applicability of the snow removal law and the duty it imposes?

I N D E X

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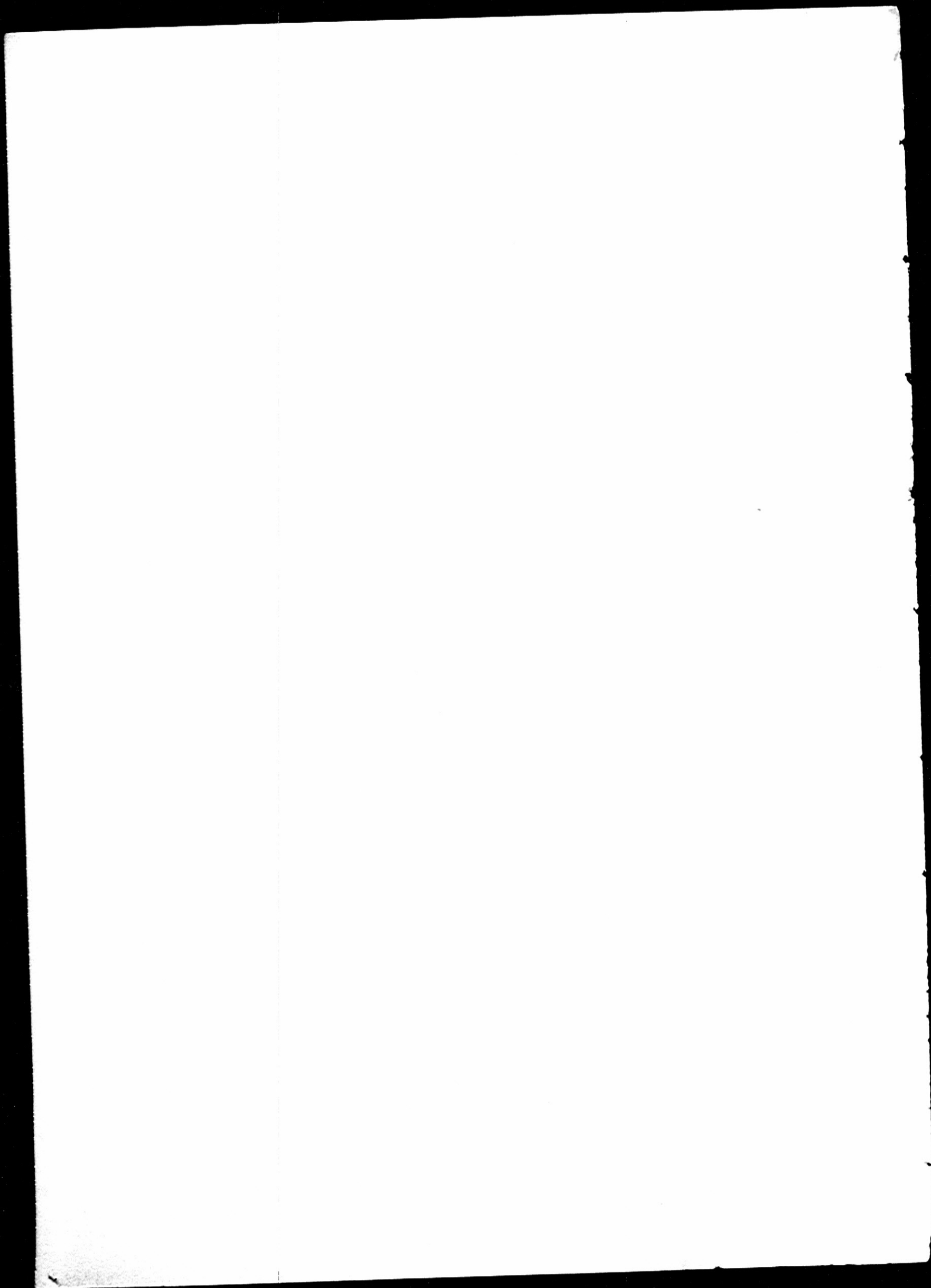
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**UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit**

No. 20,342

JACKSON N. KRILL, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA, et al.,

Appellees.

**Appeal From The United States District Court
For The District Of Columbia**

BRIEF FOR APPELLEE DISTRICT OF COLUMBIA

COUNTER-STATEMENT OF THE CASE

The Pleadings

Jackson Krill sued both Peoples Drug Stores, Inc., and the District of Columbia for damages for personal injuries sustained as a result of a fall, on December 24, 1962, on the sidewalk near the intersection of Albemarle Street and Wisconsin Avenue, Northwest,

in the District of Columbia (J. A. 1-3).¹ Jackson Krill's wife -- Mae Morgan Krill -- joined in the action, demanding damages of both Peoples and the District, alleging that, by reason of the occurrence, she suffered the loss of consortium of her husband (J. A. 3).

Mr. Krill alleged that his fall was caused by a dangerous condition on the sidewalk, consisting of snow and ice, which, by the negligence of agents or employees of Peoples and the District, was allowed to accumulate (J. A. 2). In their answers, both Peoples and the District denied all allegations of negligence and pleaded contributory negligence and assumption of risk on the part of Jackson Krill (J. A. 4-7). In addition, with respect to the claim of Mae Morgan Krill, the District alleged that her claim was barred for failure to comply with the provisions of D. C. Code, § 12-208 (1961), requiring notice (J. A. 6).

¹ Hereinafter, Peoples Drug Stores, Inc., will be referred to as "Peoples," and the Government of the District of Columbia will be referred to as the "District."

At the conclusion of the plaintiffs' (appellants') case, the court directed a verdict for defendant (appellee) Peoples (J. A. 164).² Thereafter, the case against the District was submitted to the jury which returned a verdict in its favor (Supp. J. A. 3).

This appeal followed (Supp. J. A. 4).

The Evidence

On Saturday, December 22, 1962, snow mixed with sleet fell in the District of Columbia and covered the ground to a total depth of 5.3 inches (J. A. 135).

Mr. Krill testified that, on Christmas Eve, 1962, at about 5:00 p.m., he, with his wife, drove to the intersection of Albemarle Street and Wisconsin Avenue, Northwest (J. A. 10-11). In order to shop at the Peoples Drug Store located at the southeast corner of that intersection, he parked his automobile at the north curb of Albemarle Street east of the Wisconsin Avenue intersection (J. A. 11). He alighted from his automobile, entered the drug store, where

² As the transcript indicates, the District did not offer any evidence at trial (Tr. 427), and its motion for a directed verdict made at the end of the Krills' case was denied (Tr. 520).

he purchased razor blades and stamps, and then departed, walking east on the south sidewalk on Albemarle Street (J. A. 12-13, 27).

In the area immediately outside the entrance to the store, a pathway about 10 feet wide had been completely cleared of snow and ice (J. A. 30). Mr. Krill traversed the cleared area and, after taking 5 or 6 strides along the south sidewalk on Albemarle Street, he slipped and fell to the ground (J. A. 30, 114).

At the time of his fall, he was not wearing any protective footgear, i.e., no galoshes or rubbers; rather, he was wearing just an "ordinary low-cut shoe," and was not carrying anything other than the stamps and razor blades which he had purchased (J. A. 14, 29, 30). Mr. Krill testified that it was still light and visibility was "reasonably good" (J. A. 28); that he was watching his feet as he walked (J. A. 39); and that he did not see the patch of ice on the sidewalk on which he fell until his legs went out from under him (J. A. 13, 34, 46-47).

In describing the place where he fell, Jackson Krill testified that the " * * * snow and ice * * * had been walked on and had frozen into hummocks and peaks and pits * * *" (J. A. 13). He further described it as being in the nature of "frozen slush rather than fresh

snow" (J. A. 17, 39), and judged from its appearance that the sidewalk had not previously been cleared (J. A. 17, 35).

As a result of his fall, Jackson Krill was taken to the hospital for treatment of his injury (J. A. 16).

At the conclusion of all the evidence, counsel for appellant made an oral request that the court instruct the jury with respect to the applicability of the snow removal law, D. C. Code, §§ 7-801 and 7-802 (1961), which the court refused to do (J. A. 182; Supp. J. A. 6-7).

SUMMARY OF THE ARGUMENT

The only error raised on this appeal is that the trial court erred in refusing to instruct the jury on the District of Columbia snow removal law and the duties it imposes. However, since the proffered instruction is not included in the record or set forth in appellants' brief, the allegation of error should not be considered on appeal.

In any event, this Court has held that the basic liability of the municipality, with respect to injuries sustained by reason of the condition of its streets and sidewalks, has not been changed by the provisions of the snow removal law.

ARGUMENT

The trial court did not err in its instructions to the jury.

As nearly as can be determined from an examination of appellants' brief, the sole assignment of error respecting the District of Columbia is that the trial court erred in refusing " * * * to instruct the jury properly on the snow removal law of the District of Columbia and the consequent duties on the appellees." But appellants have not set forth, either in their brief or in the joint appendix, the requested instruction. In 5 AM. JUR. 2nd, INSTRUCTIONS, § 696, it is said in this connection:

"The general rule that the appellant's brief must be so prepared that all questions presented by the assignment of errors can be determined by an examination of the briefs, and questions not so presented are deemed waived, applies to errors in the giving or refusing of instructions. Exceptions reserved to the instructions of the trial court will not be considered on appeal unless the brief clearly points out the alleged defect. When an assignment relates to the giving or refusing to give specific charges to the jury, then the assignment in order to be complete should quote the instruction, together with the objections and rulings of the court with appropriate page references to the record to all such matters.

"Nor will an appellate court consider the claimed impropriety of a refusal to give offered instructions where the appellant does not point out wherein the subject of the instructions was not in fact covered by those actually given. * * *"
 [Footnotes omitted; emphasis supplied.]

Appellants apparently labor under the misconception that the snow removal law imposed upon the District of Columbia some additional liability for the maintenance of its streets. But, in Smith v. District of Columbia, 89 U. S. App. D. C. 7, 189 F. 2d 671 (1951), this Court made it abundantly clear that the District of Columbia snow removal law did not increase in the slightest degree the basic liability of the District of Columbia for injuries sustained by reason of the condition of its streets and sidewalks. Said the Court at page 9:

" * * * We held in Radinsky v. Ellis [93 U. S. App. D. C. 172, 167 F. 2d 745 (1948)] that the snow removal statute does not impose a liability on a property owner to respond in damages to a pedestrian who is injured by falling on snow which the owner has not removed from the sidewalk. * * * Implicit in the decision, however, is the holding that the statutory provision requiring a property owner to remove snow from the abutting sidewalk did not impose a liability different from or in addition to the liabilities theretofore existing for damages to persons injured. We think that the same doctrine applies to the District Government. The snow removal law did not change or add to the basic liability of

the District Government in respect to safe conditions on the public streets." [Emphasis supplied.]

Thus, notwithstanding that this Court said in Smith, supra, that the snow removal ordinance did not alter the District's liability, appellants contend, in effect, that the District's failure to remove or treat ice and snow within the first eight hours of daylight after its accumulation³ is negligence as a matter of law. But this Court

³ There is no evidence in the record to indicate that the District failed, within eight hours of daylight after its accumulation, to treat or remove the ice upon which appellant Jackson Krill fell. D. C. Code, § 7-802 (1961). The accumulation of frozen slush is not necessarily coextensive with the period during which snow remains on the ground. In Smith v. District of Columbia, supra, at page 11, the Court explained:

" * * * if a snowfall occurs and the weather remains for some days above freezing but below a temperature which would melt the snow and cause it to flow away, so that a condition of slush, not dangerous, remains, and then the slush is frozen by a drop in the temperature, the time chargeable against constructive notice upon the city would be from the date of the freeze and not from the date of the snowfall."

The record in the case at bar indicates that Jackson Krill slipped on "frozen slush rather than fresh snow" (J. A. 17, 39), and that, on the very day he fell, the temperature climbed above the freezing mark (J. A. 135). From aught that the record shows, the "frozen slush" upon which he fell might have formed into a dangerous condition anywhere from within a matter of minutes to a few hours prior to his fall.

formulated the rule governing municipal liability for injuries resulting from dangerous accumulations of snow and ice on streets and sidewalks, specifically excluding any consideration of the 8-hour requirement of the snow removal law. The Smith rule imposes such liability:

" * * * if snow or ice has been permitted to remain untreated on a sidewalk or crosswalk and has been formed into humps or ridges or other shapes of such size and location as to constitute a danger aggravated over its original mere slipperiness and unusual in comparison with general conditions naturally prevalent through the city, and if such condition has remained for a period of time sufficient to give rise to a constructive notice to the municipal authorities and an opportunity for them to remedy it * * *."
Id. at page 11.

Under the rule in Smith, before municipal liability can be assessed, it must be shown, inter alia, that the city had notice of the dangerous condition "and an opportunity for them to remedy it."

Id. Under the rule which appellants urge, however, the city, by failing to treat or remove ice and snow within the 8-hour period following a snowfall, is negligent, ipso facto, notwithstanding the absence of any showing of notice, actual or constructive, of the condition complained of.

Neither Congress nor this Court could have intended such a chaotic contradiction in the rules governing municipal liability. The rule laid down by this Court in the Smith case is the only correct and applicable rule.

CONCLUSION

Since the only error which appellants allege is without merit, and since the verdict of the jury was supported by clear and substantial evidence, it is respectfully submitted that its verdict in favor of the District should be affirmed.

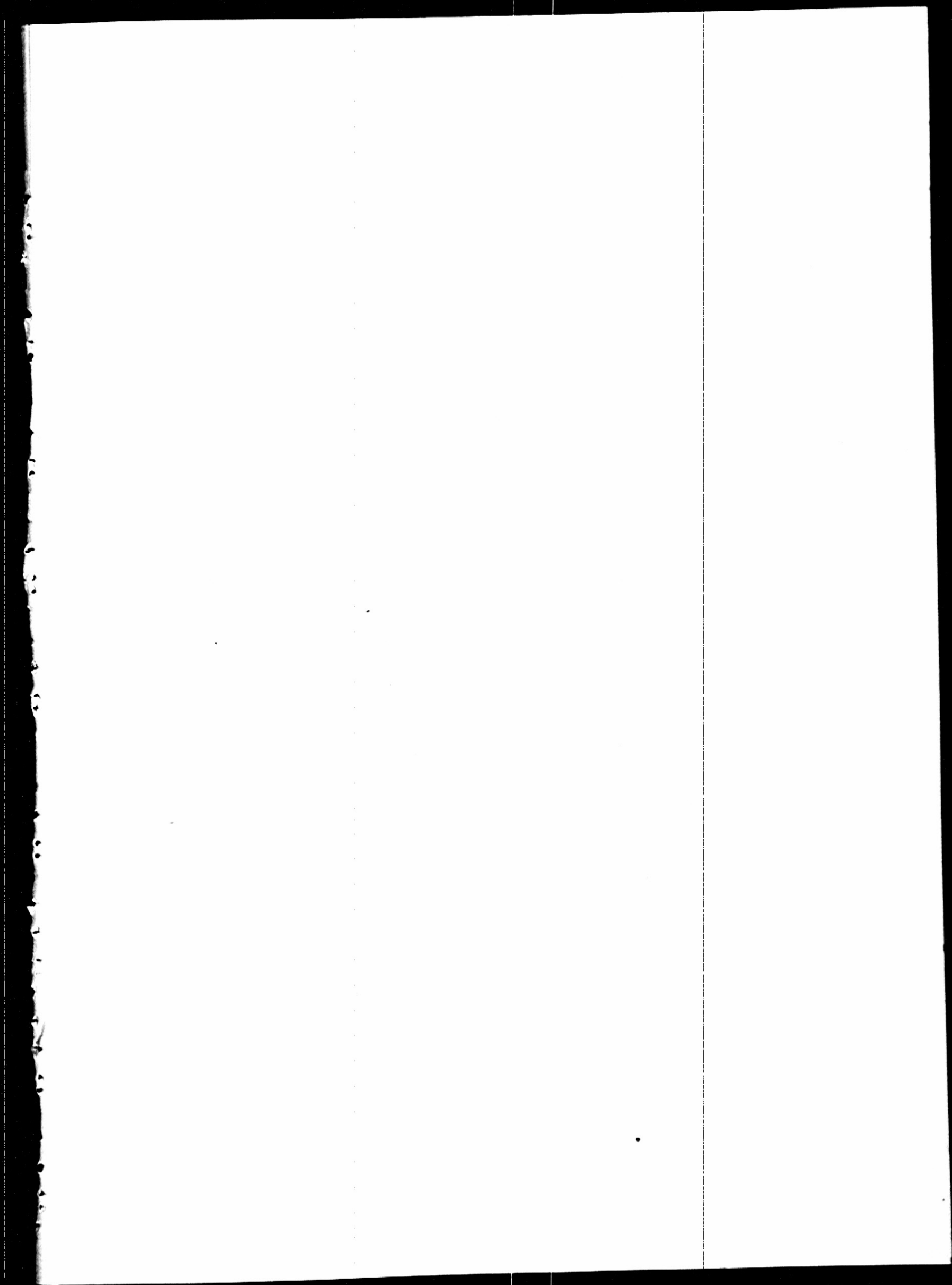
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BRIEF FOR APPELLEE PEOPLES DRUG STORES, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,342

**JACKSON N. KRILL,
and
MAE MORGANS KRILL,**

Appellants,

v.

**DISTRICT OF COLUMBIA,
and
PEOPLES DRUG STORES, INC.,**

Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 7 1966

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(i)

QUESTIONS PRESENTED

In the opinion of appellee Peoples Drug Stores, Inc. the following questions are presented:

1) Was not the trial court correct in directing a verdict for appellee Peoples Drug Stores, Inc. when the law in the District of Columbia does not require an abutting occupant of a public sidewalk to remove the snow and ice that has accumulated thereon and this is where male appellant fell?

2) Was not the trial court correct in directing a verdict for appellee Peoples Drug Stores, Inc. when the male appellant by his own actions leading up to the fall was contributorily negligent as a matter of law?

(iii)

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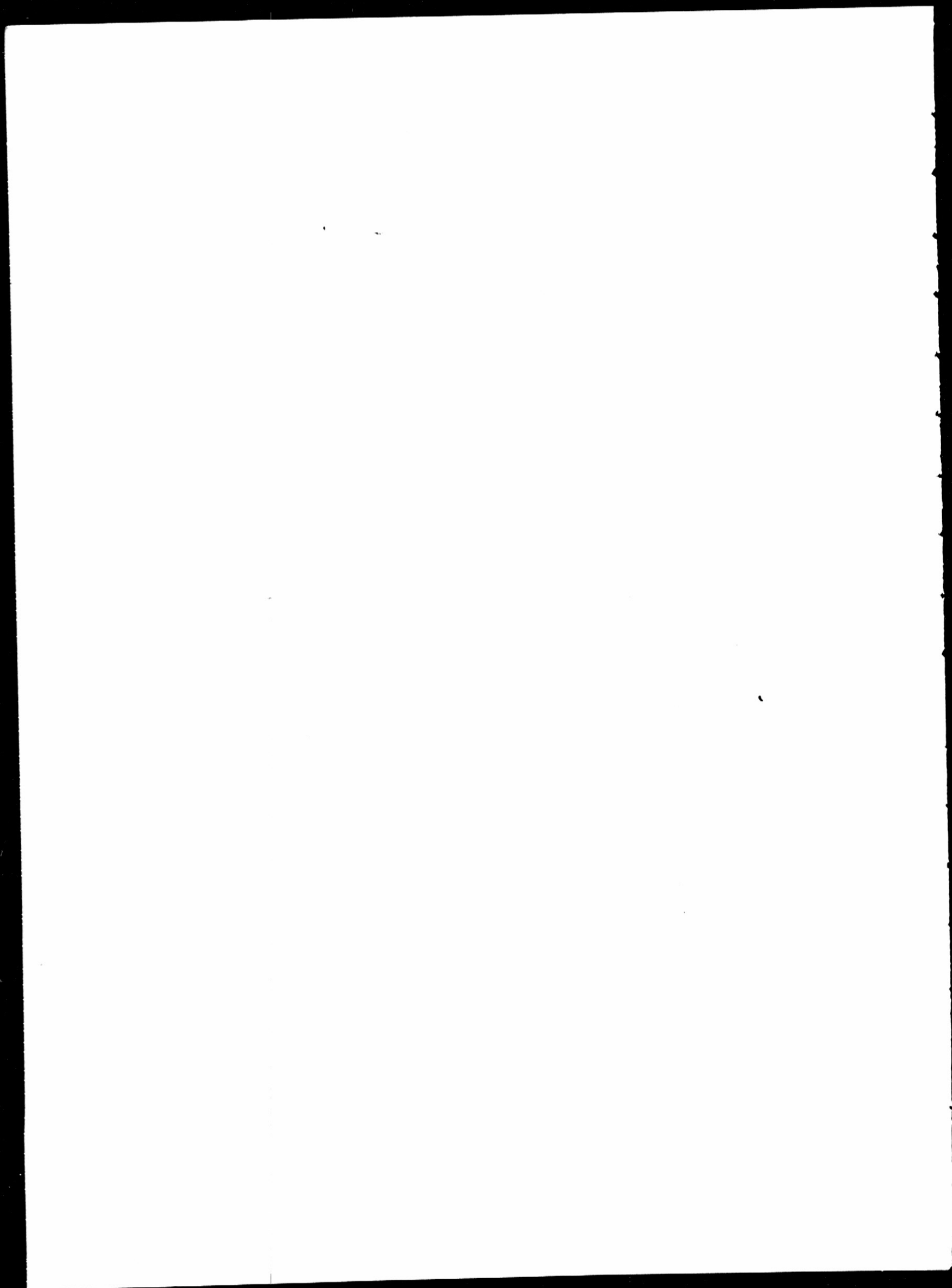
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE PEOPLES DRUG STORES, INC.

COUNTER-STATEMENT

This appeal arises out of a personal injury action filed by appellants against the District of Columbia and Peoples Drug Stores, Inc. in the United States District Court for the District of Columbia. (J.A. 1)

At the trial of the instant matter at the conclusion of all the evidence,

Judge Burnita Shelton Matthews directed a verdict in favor of Peoples Drug Stores, Inc. (J.A. 164) The issue as to the District of Columbia was submitted to the jury which entered a verdict in favor of the District of Columbia. (S.J.A. 3) These appeals followed. (S.J.A. 8)

At the trial of the instant cause the male appellant testified that on December 24, 1962, he, together with the female appellant, his wife, had delivered a Christmas gift to a friend. (J.A. 10)¹

On the way home he parked his automobile on Albemarle Street, east of the intersection with Wisconsin Avenue, N. W., in order to make a purchase at a Peoples Drug Store located on the southeast corner of that intersection. (J.A. 11) This was a neighborhood which was familiar to him. (J.A. 11)

It was about 5 p.m. and the weather conditions were cloudy, gloomy and cold. (J.A. 10, 11, 41) Parking, he proceeded to walk along the north sidewalk of Albemarle Street toward the intersection with Wisconsin Avenue, a distance of approximately one block. (J.A. 11) The condition of the sidewalk on the north side was bad because of ice and snow. The sidewalk was not easily traversed. (J.A. 12, 26, 27, 41) He was wearing regular street shoes as he proceeded along. (J.A. 29) He described the snow and ice on the north sidewalk as approximately 3 or 4 inches deep. (J.A. 26, 41) When he reached Wisconsin Avenue he crossed Albemarle Street which was clear of snow and ice, and entered the Peoples Drug Store. (J.A. 12, 35) A 10 foot wide path had been cleared of snow and ice from the southeast curblane of the intersection to the Peoples Drug Stores' front door. (J.A. 12, 29, 34, 39, 45) He was in the store for a short time, made his purchases and then left. (J.A. 13) There was "reasonably good visibility" as he turned to his right to return to his motor vehicle by way of the south sidewalk of Albemarle Street instead of the

¹ Her claim was for loss of consortium.

north sidewalk that he had used previously. (J.A. 13, 28, 42)² A short time thereafter he slipped and fell and sustained personal injuries. Where he exactly fell, from his testimony, is not clear.

He testified that after leaving the 10 foot cleared strip in front of the store, he walked east on the south sidewalk with his eyes on the sidewalk. (J.A. 13, 39) The entire area going in the easterly direction on the south sidewalk of Albemarle Street was covered with ice and snow which was thicker and wider spread than that found on the north sidewalk. (J.A. 27, 41) He was not aware of this at first until he had actually walked into the area and fell. (J.A. 33)

On one occasion during the trial he testified he thought he had taken 5 to 10 steps into the icy area when he fell (J.A. 14), on other occasions 5 or 6 strides (J.A. 33, 45), then again approximately 20 to 25 feet total distance (J.A. 30), then on other occasions he had testified he walked 25 or 30 feet into the icy area (J.A. 30, 31) and again approximately 45 feet from the entrance to the store. (J.A. 31) The greatest distance that he had walked into the ice was 30 to 40 feet. (J.A. 112, 114) The evidence in the case later showed that the actual distance from the front door to Peoples Drug Store to the end of its leased premises on Albemarle Street was 97 feet. (J.A. 149)

On the other hand he testified he was 10 or 12 feet from the drainpipe at the end of the building. (J.A. 18)³ On another occasion he testified he was about 20 feet from the end of the building (J.A. 31, 36), and again 10 to 12 feet from a downspout. (J.A. 35) In addition, the male appellant testified that his fall was near a power pole which pole is ap-

² Peoples Drug Stores Exhibit Number 6 showed that the street lights went on at 4:51 that day. (J.A. 162)

³ If this were correct, he was not walking on the sidewalk but a grassy area (public parking space) that extended 18 feet from the north property line of the building to the south sidewalk of Albemarle Street. (J.A. 153)

proximately 25 feet north and 85 feet east of the entrance to Peoples Drug Store and substantially more of a distance than 40 feet from the front door. (J.A. 18, Peoples Exhibit No. 5)

He said if he had known that there was ice and snow on the south sidewalk he would not have walked into it (J.A. 47), and further stated that it was a gamble originally for him to walk up on the north sidewalk, a gamble that he wouldn't slip. (J.A. 44) He was aware that the snow and ice on the south side of the street melted slower than the snow and ice on the north side. (J.A. 41) He could have walked down the center of the street safely. (J.A. 44) On this particular evening there was very little pedestrian and motor vehicular traffic. (J.A. 28, 42)

Peoples Drug Stores Exhibit No. 7 was the local climetological data report from the United States Department of Commerce Weather Bureau and this revealed that on December 21, 1962 approximately 5.3 inches of snow fell throughout the Metropolitan area of the District of Columbia, and that no additional precipitation had fallen in this area after the early morning hours of December 22, 1962.

The temperature readings on:

December 22, 1962	maximum 38°	minimum 24°
December 23, 1962	maximum 44°	minimum 25°
December 24, 1962	maximum 34°	minimum 23° ⁴

Peoples Drug Store Exhibit No. 5, a survey map of Wisconsin Avenue and Albemarle Street, indicates the following facts as to the distances between various points in the general area: the distance from the front door along the property line in an easterly direction to the end of the building that Peoples leased was approximately 97 feet. (J.A. 149) Adjacent to the building and abutting to the property line approximately 25 feet east of the front door was a grass and earth area, public parking

⁴ In appellants' brief as to this latter figure, it is inadvertently listed as 33°. (App. B 4)

space, which was 18 feet wide and 73-1/2 feet long extending to the end of the building. (J.A. 150) This parcel of land abutted the south public sidewalk of Albemarle Street on which male appellant allegedly was traveling at the time he fell. This exhibit also shows the topographical situation at the site which indicates a 4 foot drop in elevation from the front door to the end of the building and a slighter drop in elevation away from the building line in a northeasterly direction. (J.A. 151, 152)

Peoples Drug Stores offered into evidence their lease which showed that Peoples was not the owner of the building in question and that it was the owner's responsibility to make all necessary repairs to the roof and exterior of the leased premises and the owner further agreed to keep the roof and exterior of the building in good repair and condition during the full term of the lease. (J.A. 163)

STATUTES INVOLVED

Title 7, Section 801, D. C. Code 1961 Edition. Snow and ice to be removed from sidewalks within fire limits by owner or occupant of abutting property.

It shall be the duty of every person, partnership, corporation, joint-stock company, or syndicate in charge or control of any building or lot of land within the fire limits of the District of Columbia, fronting or abutting on a paved sidewalk, whether as owner, tenant, occupant, lessee, or otherwise, within the first eight hours of daylight after the ceasing to fall of any snow or sleet, to remove and clear away, or cause to be removed and cleared away, such snow or sleet from so much of said sidewalk as is in front of or abuts on said building or lot of land.

Title 7, Section 805, D. C. Code 1961 Edition. Removal by Commissioners upon default by owner or occupant—Expense.

In the event of the failure of any person, partner-

reasonably safe for travel, as hereinbefore provided, it shall be the duty of the Commissioners of the District of Columbia, as soon as practicable after the expiration of the time herein provided for the removal thereof, or for the making of the said sidewalks reasonably safe for travel, to cause the snow and ice in front of such building or lot of land to be removed or to cause the same to be made reasonably safe, as hereinbefore directed to be done by such person, partnership, corporation, joint-stock company, or syndicate in charge or control of such building or lot of land, and the amount of the expense of such removal or such work of making the said sidewalks reasonably safe for travel, shall in each instance be ascertained and certified by the said commissioners to the corporation counsel of the District of Columbia.

Title 7, Section 806, D. C. Code 1961 Edition. Suit for recovery of cost.

The corporation counsel is hereby directed and authorized to sue for and recover from such person, partnership, corporation, joint-stock company, or syndicate, the amount of such expense in the name of the District of Columbia, together with a penalty not exceeding \$25 for each offense, with costs, and when so recovered the amount shall be deposited to the credit of the District of Columbia.

SUMMARY OF ARGUMENT

In the District of Columbia the abutting occupant of property has no duty to remove snow and ice from the public sidewalk adjoining its property. Male appellant fell on the public sidewalk. The responsibility for snow removal rests solely with the District of Columbia. The trial court properly directed a verdict in favor of Peoples Drug Stores as a result thereof.

Assuming *arguendo* that there was a duty to remove the snow and ice from the public sidewalk, male appellant when he went into an area clearly dangerous ignoring a safe route back to his motor vehicle was contributorily negligent as a matter of law.

ARGUMENT

I

Peoples Drug Stores had no duty to remove snow and ice from the public sidewalk where male appellant fell.

Appellants have made a number of statements in their brief as to their interpretation of what the law is in the District of Columbia as to the responsibility of the landowner to a pedestrian who slips and falls on a public sidewalk either fronting or abutting the property of the landowner.

Appellants contend that an occupant of real property is required to maintain the means of ingress and egress to his property in a reasonably safe condition for invitees. In support of this is cited *Pessagno v. Euclid Investment Company*, 72 App. D.C. 141, 112 F.2d 577 (1940). The *Pessagno* case is a slip and fall case on a "private driveway." This is clearly not applicable to the instant situation since appellants admit that the slip and fall involved here was on a public sidewalk owned by the District of Columbia. It is further contended that since the sidewalk where male appellant fell was fronting or abutting a building over which Peoples Drug Store controlled, Peoples owed a duty to the male appellant to clear the snow and ice from all approaches to its store. At common law the abutting landowner had no duty to remove snow and ice from the public sidewalk adjoining its property. This Court has repeatedly said that the snow removal law does not change the common law. The snow removal law only involves the relationship between the District of Columbia and the landowner. *Radinsky v. Ellis*, 83 U.S. App. D.C. 172, 167 F.2d

745 (1948); *Hecht Company v. Hohensee*, 65 App. D.C. 328, 83 F.2d 585 (1936). The responsibility for snow removal rests with the District of Columbia since they are the owners of the public sidewalks.

The male appellant's fall was not at or near the entrance to Peoples Drug Store but was on that portion of the public sidewalk used by the general public who went up and down the sidewalk of the south side of Albemarle Street, N. W. Obviously only a small fraction of those individuals eventually became customers of Peoples Drug Store. Appellants have cited *Robinson v. Park Central Apartments*, (D.C.D.C. 1966) 248 F. Supp. 632, recently affirmed by this Court without a written opinion, wherein the District Court found that there is some responsibility on the part of the abutting landowner to make reasonably safe those portions "of the sidewalk immediately adjoining or abutting the entrance to private property." Peoples Drug Stores has no quarrel with that language although it seems to go further in setting forth a duty on landowners than that required at common law. In the instant case Peoples Drug Store had cleared from its only entrance snow and ice on the public sidewalk from said entrance to the southeast curblin of the intersection of Albemarle Street and Wisconsin Avenue, N. W. This cleared portion was 10 feet wide. The male appellant had left this cleared area and was proceeding on down the south sidewalk of Albemarle Street when he fell.

It should be recalled that the area of the sidewalk where male appellant fell was separated from the property line of the building in question by an 18 foot strip of grassy and earth area which was public parking space and owned by the District of Columbia, so clearly the site of the fall did not abut or adjoin this building. Certainly if this 18 foot strip had been owned by a third party there would rest no responsibility on Peoples so therefore Peoples did not even have a responsibility to the District of Columbia to clear this portion of the sidewalk.

There is an unusual contention made by appellants that Peoples, by clearing a 10 foot strip, "deceived invitees into a feeling of safety by

cleaning a portion of the public sidewalk." The male appellant testified that he was looking where he was going at the time he fell, that there was reasonably good visibility, that he knew the area, and that he had used this same 10 foot strip when he entered the store.

One further matter remains. Appellants have in their brief dropped in casually a paragraph in parenthesis about a downspout at the end of the building in question. The male appellant testified that this downspout was somewhere in the area of the end of the building. He did not see any water dripping from it, he obviously was not aware of whether it was functioning, he did not know who owned the downspout, he didn't even know who owned the building. The most he could say was that it was on the building in which Peoples has its store. (J.A. 47, 48) He observed the drainpipe as he sat on the ice waiting for help to arrive. He said that the ice was thicker and deeper at that point. (J.A. 19) There is nothing in the record to indicate that this was the condition at the place where he fell or in any way had anything to do with his fall.

II

Male appellant's actions leading up to his fall were contributorily negligent as a matter of law thereby precluding recovery by both appellants.

Assuming *arguendo* that the lower court directed a verdict improperly on the issue contained in Argument I of this brief there is another aspect of the case to be discussed. The actions of the male appellant leading up to his fall presented to the lower court a clear case of contributory negligence, as a matter of law, thereby precluding recovery by both appellants.

The male appellant was wearing only regular street shoes when he left his car and started to walk up along the north sidewalk of Albemarle Street to the intersection with Wisconsin Avenue. The visibility was rea-

sonably good and the street lights were on. He was familiar with this area having previously lived in the neighborhood. There was ice and snow on the north sidewalk. The condition was so dangerous that it was a gamble that he wasn't going to slip. The snow and ice was 3 or 4 inches deep. He knew the snow on the south sidewalk would not melt as quickly as on the north sidewalk because it did not get as much sun.

Prior to entering the drug store he walked over a 10 foot cleared area leading to the front door which indicates he knew there was snow and ice on both sides of the path. For some reason after leaving the store instead of returning to his car by a safe route, that is, the street which was clear except in spots, he took the most dangerous route—the south sidewalk. He said he was watching where he was going on one hand but then he said if he had known about the snow and ice he would not have used this route. He alleges that he fell before he realized the dangerous condition. If an evaluation was made of his various statements as to where he fell, he took anywhere from 5 to 35 strides into this dangerous, unsafe, frozen area using 2-1/2 feet a stride as a norm which seems a long stride under these circumstances. The male appellant is an individual trained in observation and to notice dangerous situations, but for some reason exposed himself to an unnecessary hazard that unfortunately resulted in physical injury.

In *Burgan v. Dreyfuss*, 104 U.S. App. D.C. 280, 261 F.2d 746 (1958) this court affirmed the District Court which had directed a verdict for a defendant when the evidence showed that plaintiff could have reached her destination by a safe route but instead took a route known to be dangerous. This is applicable to this case since male appellant knew there was a safe route back to his car, but failed to use it. In *McKey v. Fairbairn*, ___ U.S. App. D.C. ___, 345 F.2d 73 S (1965) this Court affirmed the District Court which had directed a verdict for a defendant when the evidence showed that plaintiff knew of a slippery condition that existed and nevertheless walked on it and fell. In the *McKey* case this Court quoted from

Safeway Stores, Inc. v. Feeney, (D.C. Mun. App. 1960) 163 A.2d 624, as follows at page 743:

"Contributory negligence is, of course, an issue of fact for the jury unless only one reasonable inference can be drawn from the evidence, in which case it becomes a matter of *law* for the court to decide."

The instant case is a casebook example of contributory negligence as a matter of law.

CONCLUSION

Wherefore, it is respectfully requested that the verdict of the Court below be affirmed.

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